Qu. Thurston
15. H. a

Tryals per Pais,

OR THE

LAW of ENGLAND

CONCERNING

JURIES

BY

Nisi Prius, &c.

Collected and Composed for the Publick good in the 16*th*. year of the Reign of our Soveraign Lord *Charles* the Second, King of *England*, *Scotland*, *France* and *Ireland*, &c.

The Second Edition Newly revised, and much inlarged, with an Addition of Precedents, and Forms of Challenges, Demurrers upon Evidence, Bills of Exception, Pleas *puisne* *Darrein Continuance*, &c.

Very Useful and Necessary for all Lawyers *Attorneys* and other Practicers, especially at the *Assises*.

By *G. D.* of the Inner *Temple* Esquire.

Per testes solum, lex ipsa nunquam litem dirimit, quæ per Juratam xij. hominum *decidi poterit. Cum sit modus iste ad veritatem eliciendam multo potior, & efficacior, quam est forma aliquarum aliarum legum orbis.* Forteſcue. cap. 31.

LONDON,

Printed for *George Dawes*, over against *Lincolns Inn* Gate in *Chancery Lane*. 1682.

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Tryals per Pais

I Do allow the PRINTING and PUBLISHING of this BOOK, Entituled **Tryals Per Pais: Or, The Law of England, Concerning Juries** by Nisi Prius.

Fr. Pemberton.

Duncombe (S.) K

Ru Thurston
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PH
MVSEVM
BRITANNICVM

TO THE PRACTICERS OF THE LAW.

Gentlemen,

IN the Dedication of Books, ſuch perſons ſhould be choſen, whoſe Studies or Profeſſion agree with the nature of the Subject. To prove concluſions, in one ſcience, by the Heterogene Principles of another; To make a Grammarian Patron to a pecie of the Mathematicks; to dedicate a Treatiſe of Logick to

a Master of Musick, *or a matter of* Practice, *to a man of* Speculation; *would not only be improper, but absurd. You know that in the whole Practice of the Law, there is nothing of greater excellency, nor of more frequent use, than Tryals by* Juries. *In this, our Common-Law (and not without just cause) values it self, beyond the* Imperial Laws, *before the* Canon Law, *or any other Laws in the world. And seeing the hopes and life of all the Process, the force of the judgement, and the truth, nay the right of the Parties, lie in the Tryal; for as one elegantly says,* Qui non probat, *at the Tryal,* dicitur veritate & jure carere, *and indeed the knowledge of all the Law, tends to this: for without victory at the Tryal, to what purpose is the science of the Law? The Judge can give no sentence, no*

decisi-

deciſion without it, and muſt give judgement for that ſide, the Tryal goes; therefore I may well ſay, 'tis the chief part of the Practice of the Law: And if ſo, to whom ſhould I offer this Treatiſe, but to you, the Practicers?

I need ſay nothing for ſmall Tracts *and* Treatiſes: *The infinite number of them in the* Civil Law *(there being for every Title, a diſtinct Tract) nay the number of them in our Law, ſufficiently ſhews their uſe.*

Ringelbergius, *in his Book* de ratione ſtudii, *giving directions what books Students ought to carry with them, when they change places, and travel from one to another, tells us, That out of the Volums (by reaſon of their bigneſs not portable) he uſed to tear out ſeveral leafs, and take them with him, in his journeys, and ſo he ſays he had ſerved the works of* Pliny, Tully, Plato,

Demosthens, &c. *although he had given great prices for them; which justifies the writing of this Treatise, the subject matter thereof, being of such general use in all Circuits.*

When I read the elaborate books of Farinacius de testibus, *and the 3 Exquisite and Incomparable Volums of* Mascardus de probationibus, *in the Cæsarian, and Pontifical Laws, (which works were so valued and esteemed, that they were looked upon as new lights sent from Heaven, by the professors of those Laws:) I could not but see the defect, and want of such books, in our Law: for surely they are as necessary in the one as in the other. And although I cannot compare my weak indeavours, with those excellent and methodical works, theirs being intire, this only* quasi *an Abridgement, fitted for use, not for show: Yet until more learned, and judicious*

Pro-

Proficients in our Law, ſhall undertake the work, I thought fit to produce mine.

To compare this ſort of Tryal by Jury, *with the Tryals of other Laws and Countries, and declare how much and wherein it excels them all, after* Portaſcue de laudibus, &c. *and his learned* Commentator; *would be like the arrogance of Limning after* Apelles, *and requires the room of a Volum, rather than an Epiſtle. And conſidering my own inſufficiencies, I ſhall praiſe it more by ſaying nothing, than all I can: for to ſay leſs than a thing deſerves, would be, inſtead of an Encomium, a diſparagement. Therefore I ſhall confine my ſelf only to ſay, that Tryals in other Laws are by Witneſſes only, privately examined: This, by Witneſſes publickly examin'd and confronted; and by* Jury *alſo, and ſo conſequently the*

fact

fact is ſetled, with the greater certainty of truth, upon which the uprightneſs of the judgement depends.

It would be well if there were leſs corruption in the returning of Juries, *but I think 'tis parallel'd, if not exceeded, by that of examining Witneſſes privately, on whoſe depoſitions, the Tryals in other Laws conſiſt: And ſo that muſt be no objection againſt the thing. I hope an expedient may be found out to prevent the corruption in returning* Juries, *but I believe it never can in the other.*

To ſay this Tryal by Jury *is too popular in a Monarchy, would be a good objection, from a* French-man, *but not of any Engliſh-man, who lives under the beſt tempered Monarchy, and the beſt ſort of Government in the World, to which this manner of Tryal is ſo proper, and well accommodated, that neither the wiſdom of our Anceſtors*

ſtors could, nor (I may ſay) can this preſent, nor after ages invent a better.

But as the unskilful Painter, *drew a Curtain, before what he could not expreſs, with his Pencil, ſo muſt I vail, with ſilence, the excellencies of this Celebrated* Tryal, *which I am not able to delineat.*

Gentlemen,

To make an Apology for the ſtile of a Law book, eſpecially of an Epitome, would be a vain thing, Ornari res ipſa negat contenta doceri; *neither ſhall I make any Apology for my undertaking this work: if 'twas better performed, yet* Momus *would be carping; and if 'twas worſe, it would be good enough for him, who cannot, or will not, do it better: Be it what it will your kind reception will abundantly ſatisfie*

Your Servant

G. Duncombe.

Pre-

THE PREFACE TO THE FIRST EDITION.

THE Philoſopher could not ſee a man unleſs he heard him ſpeak; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only diſcriminates the Man: For, although an *Ideot* who hath but the ſhape of a man, may with ſilence ſo hide his folly, that ſtrangers to his Manners cannot diſcern him from a Sophiſter; Yet, doubtleſs, Silence is the greateſt Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the braveſt ſpirits.

Where-

Historiæ facil princeps.

Wherefore Learned *Salust* from this takes his Exordium; *Omnes homines qui sese student præstare cæteris animalibus, summa ope niti decet, ne vitam silentio transeant, veluti pecora*: Thoſe men who would excel Beaſts, ſhould labour that their lives might not paſs in ſuch ſilence, as Beaſts do. It ſeems he deemed, that man little inferior to a Beaſt, who acted nothing to prolong his Memory; For this he held to be the duty of every man, ſaying, *Quo mihi rectius esse videtur, ingenti quàm virtum opibus gloriam quærere; & quoniam vita ipsa, quâ fruimur, brevis est, memoriam nostri quàm maximè longam efficere*: In my opinion, 'tis far better, to acquire Glory by the Riches of Wit, than ſtrength; and becauſe our lives are ſhort of themſelves, we ſhould indeavour by Ingenuity, to eternize their memory.

Nulla dies ſine linea.

And to effect this, *Nulla dies abeat, quin linea ducta ſupersit*; No day ſhould paſs over our heads wherein we ſhould not act ſome memorable exploit: Men ſhould not live like *Snails*, never ſtirring out of their hou'es

houſes; but be active (I mean not buſie-bodies in other mens matters, but) in their own Callings, of which the wiſe *Cato* tells us, *Every man ſhould give a reaſonable account*; And if we believe the famous *Seneca*, *Nihil eſt turpius quàm grandis natu ſenex, qui nullum habet vitæ ſuæ argumentum, quo diu ſe vixiſſe dicat, præter ætatem*: Nothing is more unworthy, than an old man, who hath nothing to ſhew for his Antiquity, but a Gray-Beard; Whoſe ſoul ſerved only as Salt to keep his body ſweet, and is no ſooner dead, than forgotten, long before he is half rotten; yet who is ſo apt to deride the Endeavours of other men, as this ancient *Ignoramus*, whoſe wrinkles in his face, worn-out looks, and many years ſway more with the vulgar people, than all the Arguments of Law or Reaſon? Had *Seneca* been ſuch a ſilent *Momus*, the World would never have been bleſt with his ſo learned Works. And doubtleſs writing Books is needful in no Science more than in the Law; For without Books, how would the Lawyers do for Arguments at the Bar, or Reſolutions at their Chambers? Whence

the

the Oracle Sir *Edward Cook* pronounces this, *Omnes debere Juris-prudentiæ libris componendis animum adjitere*; That all men ought to addict themselves to the Compoſing Books of Law; ſome to the Reporting of the Judgments and Reſolutions of the Judges, who are *Lex loquens*; and ſome to the collecting of theſe Caſes and Reſolutions, methodizing, and fitting them for ſome particular purpoſe, as *Littleton*, *Stamford*, *Fitzherbert*, *Crumpton*, *Perkins*, *Finch*, &c. and indeed, moſt of the Law-Books extant, if not all, (ſetting aſide the Reports) are nothing elſe, but Collections out of others. This I ſpeak, not in Derogation of them, in the leaſt; for as 'tis equally, if not more laborious; ſo 'tis full as glorious, judiciouſly to cull authentick Caſes out of the Volumes of the Law, (where ſo many are no Law) and rightfully place them in a particular Treatiſe, as 'tis to report the Judgements and Reſolutions from the mouth of the Court; for the Reporter is but the Courts Secretary, and *Cook's* Inſtitutes merit as much as his Reports;

And

And *Aſh*'s Tables, *Fitsherbert*, and *Brooks*'s Abridgement, are as uſeful as the Year-Books themſelves, of which kind of Collections, one elegantly thus breaks out, *Quo quidem beneficio, haud ſcio, aut aliud aut legum Candidatis magis gratum, aut Reipublicæ magis commodum, aut divini honoris illuſtrationi magis idoneum, vel cogitando quidem conſequi, quiſquam poterit.* Than which benefit I know not, whether any man can even imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the illuſtration of Divine honour more fit. For with the leaſt labour, a ſmall price, and little time, they preſent you with thoſe Reſolutions, and Judgements which lye ſcattered in the Voluminous Books of the Law; which would otherwiſe coſt much time, pains and charges, to find out. The thoughts of which publick good, firſt gave life to theſe Endeavors of mine: Not that any one ſhould in the leaſt imagaine, that I am ſo guilty of vain Oſtentation, as to believe, that my

Parts or Abilities can perform any thing in this kind, like other men: No, *Ipſe mihi nunquam Judice me placui.* I could never yet pleaſe my ſelf with my own labours, much leſs are they worthy to pleaſe others; *haud equidem tali me dignor honore.* However, when I conſider, that no man hath yet written particularly concerning this Subject, and of what general uſe it is, I doubt not, but that this Treatiſe will receive a favourable conſtruction from moſt men, and a plauſible acceptation from others.

The uſe of the Book.

The uſe of it, is, in a manner Epidemical; ſince mens Lives and Eſtates are ſubject to that Tryal *per Pais*, here demonſtrated; but in particular, the Practiſers at Law, (eſpecially *Circuit-Advocates, Attorneys, Sollicitors, Clerks*, &c.) and all *Jurors*, (for whoſe directions it is of ſingular uſe) are chiefly concerned herein. But I will not hang a Buſh out, to invite, and prepoſſeſs your Judgements, *Vincat Utilitas.* The profit which every ingenious Reader ſhall gather out of it, will

will ſpeak more for it, than the beſt Eulogical Preface.

And for my own part, I profeſs my ſelf to be *Philomathes*; but not *Polymathes*. And notwithſtanding the hard-favoured objections, which ſome men caſt upon it, I really think the ſtudy of the Law, to be the moſt pleaſant Study in the world. And he which delighteth in the Study of any other Art or Science, muſt conſequently be delighted with this. For the knowledge of the Law, as *Doderidge* ſaith, is moſt truly ſtiled, *Rerum Divinarum humanarumque ſcientia*, and worthily imputed to be the *Science* of *Sciences*; for therein lies hid, the knowledge of every other Learned Science.

So that he which gives himſelf to the ſtudy of Divinity, may here fill himſelf with holy and pious Principles of Divine Laws: For, *Lex eſt ſanctio ſancta, jubens honeſta, & prohibens contraria; ſanctum etenim oportet, quod eſſe ſanctum definitum*: The Law is a holy Sanction, or Decree, commanding, Fortiſcut. cap. 3.

things that be honeſt, and forbidding the contraries: Now the thing muſt needs be holy, which by definition, is determined to be holy. So that in this reſpect, ſaith *Forteſcue*, men may well call *Lawyers Sacerdotes*, that is, givers, or teachers of holy things. For the Laws being holy, it followeth, that the Miniſters, and ſetters forth of them, muſt be givers of holy things; and ſo by interpretation, doth *Sacerdos* ſignifie; and doubtleſs, he which duly conſiders thoſe Rules of *Theology*, which lie ſcattered throughout the whole body of the Law, muſt needs conclude our Laws to be Commentaries upon the Old and New Teſtament; and do ſo much bear the Image *Legis Divinæ*, that they may well be attributed to the Moſt High.

The Rules of *Grammar*, *Philoſophy natural*, *Political*, *Oeconomick*, and *Moral*; as alſo the Grounds of *Logick*, and of other Arts, and Sciences, ſo much abound in our Books, that the very reading of the Law, will make a man *Maſter* of any of thoſe Sciences.

And

And ſince *Rhetorick* is *Ars ornatè dicendi*, and conſiſteth of thoſe two parts, *Elocution*, and *Pronunciation*; How can we read in our Law-Books, thoſe Learned Arguments, Elegant Speeches, and Judgements pronounced with ſuch Eloquence and Elegance of words and matter, and not conclude, that Rethorick is the Glory and Grace of a Lawyer? Though ſome (not gifted that way) would perſwade us, that the Law hath little relation to it.

If any man be delighted in Hiſtory, let him read the Books of Law, which are nothing elſe but Annals and Chronicles of things done and acted from year to year, in which every Caſe preſents you with a petite Hiſtory; and if variety of matter doth moſt delight the Reader, doubtleſs, the reading of thoſe Caſes, (which differ like mens faces) though like the Stars in number, is the moſt pleaſant reading in the World.

I thought to have expatiated my

ſelf in this Eulogical Commendation of the Study of the Law; But when I conſider the Glory of the thing it ſelf, I think it but in vain to light the Sun with Candles; and as no Arguments will perſwade one to love againſt Nature, ſo he whom the excellency of the Law it ſelf cannot invite to ſtudy it, will never be forced to it with the fiſt of Logick, or other perſwaſion: Wherefore 'tis now time to expoſe my ſelf to the Cenſure of the Reader, who always judges according to his capacity, or affection; for which cauſe, if I were to chuſe my Reader, I could wiſh with *Caius Lucilius*, *Quod ea quæ ſcribo, neque ab indoctiſſimis, neq; à doctiſſimis legi, quod alteri nihil intelligerent, alteri plus fortaſſe, quàm ipſe de ſe:* That this Treatiſe might not be read, of the moſt Learned, nor of thoſe who are not learned at all, becauſe theſe underſtand nothing, and the others more perhaps than my ſelf.

Bracton, *l.* 1. fol. 1. However, I put this Requeſt to all, *Ut ſi quid ſuperfluum, vel perperam poſitum, in hoc opere intervenerit, illud corrigant, & emendent, vel Conniventibus*

tibus oculis pertranſeant; Cum omnia habere in memoria, & in nullo peccare, divinum ſit potius quàm humanum: That if any thing be ſuperfluous, and placed amiſs in this Work, That they will either correct and amend it, or without carping connive at it; ſince to remember to do all things right, and nothing amiſs, is rather the part of a God, than Man: wherefore let him which never offended, caſt the firſt ſtone.

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Pre-

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Challenge by the Kings Serjeant upon an Indictment of Felony, becauſe the Sheriff returned the Jury *of Life and Death, at the inſtance and requeſt and denomination of the*

the Prisoner. ibid.

Challenge by the Kings Serjeant for the King, to some of the Jury *for default of Freehold to the vallue of* 40 s. *per annum.* p. 462

A Precedent of Challenge to the Array. p. 464

A Precedent of a Plea after the last Continuance. p. 465

A Precedent of a Demurrer upon the Evidence. p. 469

A Bill of Exception. p. 470

A Release pleaded, at the Assises *after* Issue *joyned.* p. 475

The Death of one of the Defendants *pleaded after the Last Continuance.* 475

A Baron *Challenges the Pannel, because no Knight was returned of the same.* p. ibid.

Tryals per pais.

CAP. I.

The Derivation of the Word [*Jurr.*] The Definition, Antiquity and Excellency of Juries.

JUrie (Jurata) cometh of the French word [Jurer, i. e. Jurare.] And ſignifieth in Law, thoſe 12 men who are ſworn Judges in matters of fact, evidenced by witneſſes, & debated before them: I call them Judges, becauſe, as 'tis the property of the Court, Jus dicere; ſo 'tis in the power of the Jury to determine the fact, upon an Evidence Pro, and Con; According to thoſe common Adagies, Ad quæſtionem Juris reſpondent Judices; Ad quæſtionem facti reſpondent Juratores: And as the Judgment of the Court

Vid. Cap. 12 Jurie.

Vid. cap. 15. Court ought to be guided by the Law; So is the Verdict of the Jury, by the Evidence. They of the Jury are called Juratores Jurors, à Jurando, as in ancient Laws Sacramentales à Sacramento præstando.

The Antiquity and excellency of Juries.

I need not here divide and shew the differences of Juries, nor the several sorts, they being so well known, viz. The Grand Jury, or great Inquest, and petty Jury, or Jury of Life and Death, in Criminal causes, and in Civil Causes, the Assise. Jury. Inquest of Office: By some called Inquest of Jury, and Inquest of Office. Something concerning each of these, will incidently be spoken of in what follows. As to the excellency of Juries, it appears from their Antiquity.

Sr. Hen. Spelman, verb. [Inquestio] says, Tryal by Juries was used in England, Normannis nondum ingressis, Leg. Ed. Confess. Ca. 38. postea inquisisset Justitia, i.e. [Justitiarus] per Lagamannos, i.e. [legales homines] & per meliores homines de Burgo, vel de Villa, vel de Hundredo, ubi manssisset Emptor, &c.

For as to Tryal by 12 men, though Mr. Daniel and Foyldor Virgil deny it to be older than the Conquest, and the latter says there is no Religion in it, but in the number; yet he stands fairly Corrected, by that Excellent and learned Antiquary, Mr. Camden. p. 153. who says, Whereas Polydor Virg.

Virgil writeth that William the Conqueror first brought in the Tryal by 12. men, there is nothing more untrue; For it is most certain and apparent by the Laws of Etheldred, that it was in use many years before, &c. And whereas Lamb. verb. [Centuria] says, In singulis Centuriis Comitia sunto, atque liberæ Conditionis viri duodeni, ætate superiores, una cum præposito Sacra tenentes jurento, se adeo virum aliquem innocentem haud damnaturos, sontemve absoluturos, he referrs to the Laws of Etheldred, cap. 4. cited by the learned Spelman verb. [Jurata.]

And to the same doth my Lord Coke referr, Com. super Lit. 155. and Preface to his 3. and 8. Report. And as to the Religion in the number of 12. my Lord Coke gives instances ubi suprà, and Sir Henry Spelman, in verb. [Jurata] suprà, makes addition thereto.

So that I may truly say, Tryals by Juries have been used in this Nation, time out of mind, and were contemporary and coeval with the first Civil Government thereof and Administration of Justice; for amongst the first Inhabitants, the Britains, the Freeholders were used in all Tryals.

And Tryal by Juries was (as you see practised by the Saxons) continued by the Normans, and confirmed by Magna Charta.

And was ever so esteemed and prised in this Island, that no Conquest, no change of Government ever prevailed to alter it.

'Tis true, Tryals by Juries before the time of H. 2. were not so frequent, be because Sadæ or Purgationes, Ordalia, Tryals by hot Iron, hot Water, cold Water, Duels, and other Superstitious ways, were then in use; but Tryals by Juries were here in the Saxons time, and were found here, and not brought in by William the Conqueror from Normandy: Nay, rather setled by Edw. the Confessor in Normandy, where he a long time was, and taught many Laws, as you may see in the book of the Customs of Normandy.

Glanvil lib. 2. cap. 7. says, Ex æquitate autem maxima prodita est legalis ista institutio, speaking of these Tryals in opposition to Duels, &c.

The use of Juries.

Their general use (being the only Tryers of Choses in fait, almost in all Courts throughout England) speaks them a publick good. To be tryed by ones Peers is the greatest priviledge a Subject can wish for, and so excellent is the constitution of the Government of this Kingdom, that no Subject shall be tryed but by his Peers. The Lords by their's, The Commons by their's

their s, which is the Fortress and Bulwark of their Lives, Liberties, and Estates; and if the good of the Subject be the good of the King, as most certainly it is, then those are enemies to the good of the King and State, who attempt to alter or invade this Fundamental Principle, in the administration of the Justice of this Realm, by which the Kings Prerogative has flourished, and the just liberties of the people have been secured so many Ages.

And what answer shall I make to the Princes, vehementer admiror, videlicet, Wherefore are not Juries used in other Countries, if they are so good? but that of Fortescue, the Learned, who best could tell, scil. That other Countries can scarce produce one Jury, so well accomplished with Wealth and Ingeny, as one County, nay, one Hundred, can in England. Fortescue ca. 29.

But not to dwell in the Porch, I will address my self to the Gravity of the Law, where you must not so much expect the flash of Rhetorick, as the light of Reason; No, the Law knows best how to express her self, in her own terms, wherefore all other Sciences must learn, with reverence, to keep their distance, And (as the Golden Finch sings) be glad to have their spark raked up in her Ashes. Things not words most regarded in the Law. *Finch.* c. 3.

And

And since an Issue is previous; and the matter of a Tryal, I shall first give you the description thereof, and then touch upon the several Tryals allowed by the Law, for discussion of the truth.

CAP.

CAP. II.

Of an Iſſue, and the divers ſorts of Tryals thereof: and when a Tryal ſhall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battail, and when by an Almanack; what Iſſue ſhall be firſt tryed, *per Pais*; what ſhall be tryed by the Court; and what by Examination of the Attorney, Sheriff, *&c.*

Iſſue, exitus, ſaith Cook, is a ſingle, certain and material point, iſſuing out of the Allegations, and Pleas, of the Plaintiff and Defendant, conſiſting regularly upon an Affirmative and Negative, to be tryed by Twelve men; and it is twofold, ſcil. either ſpecial, as where the ſpecial matter is pleaded; or general, as in Treſpaſs, Not guilty: In Aſſiſe, nul tort, nul diſſeiſin, *&c.* And as an Iſſue natural cometh of two ſeveral perſons, ſo an Iſſue

1. Inſt. fo. 126. *Omnia unum aliquem ſortiuntur exitum, vel per patriam, vel per Judices terminandum.* Finch. Epiſtle.

Issue legal, issueth out of two several Allegations of adverse parties.

Tryals. Note, that upon a demurrer to part, and Issue to part, though it is the best way to give Judgment upon the *quæstio juris* first, yet the Court may try the *quæstio facti* first, at their discretion. 1 *Inst.* 72. 125. *Lach.* 4. Rolls. tit. Tryals. 626. 723.

And to give you likewise his definition of Tryal, It is to find out, by due examination, the truth of the point in Issue or question between the parties, whereupon Judgement may be given; And as the question between the parties is twofold, so is the Tryal thereof; For either it is quæstio Juris, (and that shall be tryed by the Judges, either upon a demurrer, Special Verdict or Exception: For, Cuilibet in sua arte perito est credendum, & quod quisque noverit, in hoc se exerceat.) Or it is quæstio facti, And the tryal of the fact is in divers sorts; First, chiefly, and most commonly, by a Jury of Twelve men, (of which kind of tryal, my intention is principally to treat in this Book.)

Proceedings in Civil Causes.

For by Twelve men are matters of fact (for the most part) tryed with us in England, in Causes both Criminal and Civil: in Causes Civil, after both Parties have said what they can, one against another, in Pleading, if there arise a question about any matter of fact, it is referred to Twelve indifferent men, to be Impanelled by the Sheriff, and as they bring in their Verdict, so Judgment passeth. And this the Judge is to declare as the Law is upon the fact found: For the Judge

Judge saith, the Jury finds thus, and then the Law is thus, and so we judge. For the Law arises upon the fact.

For Criminal Causes, the course is this: At the Kings-Bench for Middl. and at the great and general Assises, and at the general Sessions of the Peace, there is one Jury called the Grand-Jury, which consists commonly of 24 men substantial men, out of every Hundred with in the County returned by the Sheriff, and they are to consider of all Bills of Indictment preferred to them, which they either approve of by writing Bills Vera, or disapprove by writing upon them Ignoramus; and those which they approve of are to be tryed by another Jury called the Petit-Jury. Or the Grand-Jury may charge any person, upon their own Presentment, which will be of the force of an Indictment, and the party charged may Traverse the offence, and bring it to be tryed by a Petit-Jury. Proceedings in Criminal Causes.

Some lesser matters in these Courts are proceeded upon without a Jury, and some things are removed by Certiorari into higher Courts, and then must be tryed there; and that thing to which there is a Traverse put in, must be tryed and ended by a Petit Jury, which (for the most part) in all Civil and Criminal Causes are but Twelve men, which ought to be Free-

men, not Villains or Aliens, and lawful men, not Outlawed, and also men of worth and honesty.

But because it is necessary to be known, that there are many ways allowed by the Common-Law, to try matters of fact, besides this by Juries, I will here repeat some of them; And for this, first hear the Oracle, who tells you, that he had read of six kinds of Certificates, allowed for Tryals, by the Common-Law.

1 Inst. fol. 74.

Tryals by Certificate.

1. The doing of service by him that holdeth by Escuage in Scotland, was to be tryed by the Kings Marshal of his Army, Per son Certificat en escript south son seal que serra mis a les Justices, saith Littleton.

2. If it be alledged in avoydance of an Outlawry, that the Defendant was in prison at Burdeaux, in the service of the Mayor of Burdeaux, It shall be tryed by the Certificate of the Mayor of Burdeaux. Note this was when Burdeaux was parcel of the dominions of the King of England. Rolls tit. Tryal fo. 583.

3. For matters within the Realm, the Custome of London shall be Certified by the Mayor and Aldermen, by the mouth of the Recorder. vide apres 17.

4. By

4. By the Certificate of the Sheriff, upon a Writ to him directed, in case of Priviledge, if one be a Citizen or Foreigner.

5. Tryal of Records by Certificate of the Judges, in whose Custody they are by Law. All these be in temporall Causes.

6. In Causes Ecclesiastical, as Loyalty of Marriage, general Bastardy, Excommengement, profession; These and the like are regularly to be tryed by the Certificate of the Ordinary. vide apres 16.

If the Def. claim his priviledge as a Scholar of the University of Oxon, of such a Colledge, or Hall: This shall not be tryed by Certificat, but per pais. Rolls tit. Tryal. 583.

Concerning Certificates of Spiritual persons, vide Rolls ibidem. 591, 592.

7. A Record shall be tryed by the Record it self, and not per pais. But matter of fact concerning a Record is tryable by a Jury, as whether a plaint, &c. was levied according to the Custom; & non prosecutus est ullum breve, is tryable by the Country. Hob. 244. Hutt. 20. So if a Statute hath two Seals, or but one, 1 Leon. 229. 2 Cro. 375. 1 Inst. 125. b. so in a per que servitia, Records. Mixt with fact.

if the Tenant ſay he held not of the Conuſor jour del note levie, ſhall be tryed per pais. In Eſcape upon a Cepi returned ne unques in ſon gard, ſhall be tryed per Record, but upon a Capias not returned, the priſal ſhall be tryed per pais. So ſhall an action brought by Covin, for the Covin is not of Record. In a ſcire facias per Roy to have execution of a Judgment in a Quare impedit, if the Def. ſay that after the Recovery the King preſented, & iſſint Judgement execute, and the iſſue be whether the King preſented per cauſe del Judgement, or of an avoydance after the death of J. S. who was preſented by a ſtranger after the avoidance, upon which the King had Judgment; This ſhall be tryed per pais. And for this Reaſon, in pleading of Letters Patents, the place need not be alledged, where the Letters Patents were made, becauſe the Defendant cannot plead nul tiel Record, but muſt plead, non conceſſit, and then the Jury ſhall come from the place where the Lands lie. Vide li. 6. fo. 15. 1 Inſt. 117. 260. Plo. Com 231. But upon a Non eſt factum pleaded to a Deed, there muſt be a place alledged where the Deed was made, becauſe (though the Deed, as to the matter of Law, be tryable by the Court, yet) the ſealing and delivery thereof, and other matter of fact, muſt be tryed by the Jury; ſo that in this caſe of a Deed, there is a Tryal per Pais, and by the Court. 1 Inſt. fol. 35. vide apres 18.

Rolls tit. Tryal. 574.

Why there needs no *viſne*, where Letters Patents were made; otherwiſe in pleading Deeds. 4. Rep. 71.

Deed.

The

The iſſue upon an Indictment or acquittal upon this ſhall be tryed by the Record. So ſhall the allowance of a Protection in Bank. The impriſonment upon the execution, and not for other cauſe, in eſcape. The juſtification of an impriſonment, becauſe he is a Juſtice of Peace. A Statute-Merchant, Count or not Count, Baron of the Parliament, or Vicount or not. Whether a place be within the Ligeance of the King of England, or in Scotland. A Fine ſur releaſe, Rendring his body in diſcharge of his Baile, ſhall be tryed by the Record. Rolls tit. Tryal 574. What iſſues ſhall be tryed *per Record.*

But in eſcape againſt the Mayor of Staple for ſuffering J. S. in execution upon a Statute Staple to go at large, if the Defendant ſay he was not in Priſon upon the execution, but upon a Plaint there, this ſhall be tryed per pais and not per Record, becauſe 'twould be unreaſonable that the Defendant ſhould certifie a Record, where he himſelf was concerned. ibid. The time of inrolling Letters Patents ſhall be tryed per pais. Co. Lib. 4. 71. 9 H. 7. 2. What *per Pais*

Diſſeiſin of an Office in any Court, or raſing a Record in any Court, by the Filizers and Attorneys of the Court. Office Raſeing a Record.

Peers.

8. A Peer of the Realm, i. e. a Lord of the Parliament, ſhall upon an Indictment of Treaſon, or Felony, miſpriſion of Treaſon, and miſpriſion of Felony, be tryed by his Peers without Oath, 1 H. 4. 2. But in an Appeal at the Suit of the Party, he ſhall be tryed per probos & legales homines Juratores, 10 E. 4. 6. &c. becauſe that is not the Kings Suit, but the Parties. Vide li. 9. 31. Le caſe del Abbot de Strata Mercella. And in a Præmunire, his Tryal ſhall be per pais. Bolſtr. 1. part 198. Dutcheſſes, Counteſſes, or Baroneſſes, although married, ſhall be tryed, as Peers of the Realm are, but ſo ſhall not Biſhops and Abbots. Stam. 153. 20 H. 6. 9. 2 Inſt. 48, 49, 50. 156. b. 294.

12 Rep. 93. Lamb. In t. 520. 3. Inſt. 30.

Cuſtoms of Courts, &c. tryed by the Judges.

9. The Cuſtoms and uſages of every Court ſhall be tryed by the Judges of the ſame Court, if they are pleaded in the ſame Court, ib. and many other things are tryed by the Judges, as the reaſonableneſs of a fine of an offender or upon ſurrender of a Copy-hold Eſtate; and ſo it is of Cuſtomes, ſervices, and alſo of the time that a Tenant at will ſhall have to carry away his Goods: And theſe Caſes come under the Rule, which makes matter of Law to be tryed by the Judges; Vide 1 Inſt. fol. 56. And in ſome Caſes matter of fact ſhall be tryed by the Judges, as if the Plaintiff

ap-

appear by Attorney in Court, and then the Defendant pleads that the Plaintiff is dead; If one appears, and saith, that he is the Plaintiff, whether he is, or not, shall be tryed by the Judges, li. 9. 30. So the non-age of an Infant, generally by inspection of the Court. But in many Cases, Infancy shall be tryed per Pais, as if an Infant appear by Attorney, in Error, this shall be tryed per Pais, li. 9. 31. and so it is in an Ætate probanda. Inspection. v. Bulst. 1 part 131. Rolls tit. Tryals 573.

Maihim, in an Appeal of Maihim the Court may adjudge this upon the view, at the prayer of the Defendant, and this Tryal is peremptory to the Parties, by a Jury of Chirurgeons. Vide Rolls tit. Tryal 578. Maihim.

Maihim may be tryed again by the Court, by inspection for increase of Damages but then these things are to be considered, First, it must be a Maihim, and not a bare wounding. Secondly, The Maihim must be ascertained in the declaration, so as that it may appear that the Maihim inspected, and the Maihim in the declaration be all one, as was resolved Mich. 21 Car. 2. B. R. in the Case of Badwel and Burford, the principal Case of which was, that the Defendant whip'd the Plaintiffs Horse, which made him throw her, and another Horse trod on her, and maim'd her hand, and adjudged no increase of Damages in that Case, Maihim.

Case, being a Consequential, and not a direct Maihim.

Inspection. Nonage in a Writ of Error to reverse a Judgement or a fine of the Tenant by releasit, of one vouched come deins age, & issint praie le paroll à demurrer, Nonage sur aid praier, in Appeal, Audita querela, to avoid a Statute Accompt, and in all actions where 'tis prayed that the paroll demurroit, Nonage shall be tryed per Inspection. But in accompt against one of full age, if he plead Nonage when he was Bayly, this cannot be tryed by inspection. Rolls tit. Tryal 572. how this Tryal by inspection shall be, vide Rolls ibid. at large.

In all Cases where the matter may be tryed by inspection, examination or discretion of the Justices, if they doubt the matter, they may refuse to try this, and compel the Parties to a Tryal per pais, or other proofs 21 H. 7. 40. per touts Justices.

Tryals by Witnesses and proofs. 10. There are many Tryals allowed by the Common Law, by Witnesses only, without a Jury, as of the life and death of the Husband in Dower, so the proof of a Summons, or the Challenge of a Juror, must be tryed by Witnesses; and regularly, the proof ought to be by two or three Witnesses,

neſſes, 1 Inſt. 6. and divers other things must be tryed by examination of the parties and Witneſſes, as the Tryal by Wager of Law, &c. Finch 423. v. 4. Inſt. 278.

Bonage was anciently tryed by the Verdict of Eight men, but now by inſpection, and Fullage by Twelve men. *Glanvil lib.* 13. *cap.* 18.

In an Appeal by a Feme of the death of her Husband, if the Defendant ſay that the Baron is alive in another County, or generally, that he is alive, this ſhall be tryed per proofs. 41 Aſſiſe 5. Vide Rolls tit. Tryal 577. what ſhall be tryed by proofs in an Aſſiſe, and what not. Appeal.

In a Writ of Annuity if the Defendant ſay the Party is dead in Britain, this ſhall be tryed per proofs. 26 E. 3. 70. Annity.

11. Duke or no Duke, Earl or no Earl, Baron or no Baron, ſhall be tryed by the Kings Writ. lib. 5. 35. lib. 6. 53. But Dutcheſs or no Dutcheſs, &c. by marriage, ſhall be tryed per pais, becauſe the marriage is matter of fact. Dukes, &c.

12. In a Plea del alien nee, the League between the King, and the Soveraign of the Alien, ſhall be tryed by the Record of the Chancery, for every League is of Record. lib. 9. 32. League.

Mannor. 13. If a Mannor be ancient demesn, or not, it shall be tryed by the Book of Doomesday, which is in the Exchequer. But whether certain Acres be parcel of such a Mannor, or no, it shall be tryed by the Country. ib.

Courts not of Record. 14. The proceedings of a Court, which is not of Record (as the County Court, the Hundred Court, the Court Baron, &c.) shall be tryed by the Country, and not by the Rolls of the Court, because they are no Record. ib. Co. Lit. 117. b.

By Charters and Records. The Priviledges and Liberties of Courts of Record, Cities, and Boroughs must be tryed by their Charters and Records.

Wills and Administration. 15. Whether the Ordinary committed Administration to the Plaintiff, or whether the Testament was proved before the Ordinary, or whether such a Will be the Will of the Party, or whether he dyed intestate, or not? In all these Cases, the Tryal shall be per pais, because probate of Wills, and constituting Administrators, did not belong to Ecclesiastical Judges originally, but were given to them of late. But the tryal thereof is left to the Common Law, and was not given to them. lib. 9. 32. 40.

An Executor brings an Action of Debt, the Defendant pleads that the Testator never

never made him Executor, if the Plaintiff gives in evidence the Probate of the Will, the Defendant shall only give evidence in Disaffirmance of the Plaintiffs Probate, which is matter of Fact; but as to matter of Law the Court gives credit thereto, as where another Will was made, for there the parties might have appealed, but if the Seal be Counterfeit, or the Probate forged, its Tryable per Jury, Adj. Pasch. 20. Car. 2. B. R. Noell and Wells. v. Wentworth's Executor. 69.

The Tryal of all Criminal matters is by the Country, and the party accused cannot be denyed it, unless it be his own fault, as where he is mute, and will not put himself upon his Country, in due time, for then without further tryal Judgment de pain foit & dure is passed by the Judges upon him, Stamf. Pl. Coron. 150. Criminal matters.

16. In an action upon the Case for calling one Bastard, the Defendant justified that the Plaintiff was a Bastard; And it was awarded that this should be tryed per pais, and not by the Ordinary, Hob. 179. Devant. 6. And so a Plea that the Plaintiff was born at such a place before marriage, this is special Bastardy, and shall be tryed per pais. Plo. 14. Dyer 89. vide hic cap. 22. Plo. Com. 267. Special Bastardy.

Cuſtoms of *London.*

17. When an iſſue is taken, whether a Cuſtome or no Cuſtome in London, If the Mayor, Commonalty, and Citizens be parties, or intereſted in the Action, This Cuſtome ſhall be tryed by a Jury, and not by the Certificate of the Mayor and Aldermen, by the Recorder. Hob. 85. Day and Savadges Caſe. Devant. 3. Stiles 137. Moor 871. vide apres tit. Viſne. Rolls tit. Tryal 579, 580.

The Cuſtome of London ſhall be certified by the Mayor and Aldermen, by the mouth of the Recorder. Co. Lit. 74.

In an information upon the Statute 5 Eliz. for uſing a Trade, to which the Defendant was not bound Apprentice, If the Defendant plead a Cuſtom of the City, that he who is free of one Trade, may uſe any other; This ſhall be tryed by the mouth of the Recorder.

Note this difference, He that is free of one Manual Trade cannot uſe another Manuel Trade: but it is otherwiſe of thoſe Trades which are not Manual. In ſuch, one that is free of one, may uſe another by the Cuſtome.

Liberties claimed by Cuſtome in London, the Cuſtome of making Indentures of Apprenticeſhip void, if not Inrolled within a year, The Cuſtome to deviſe Lands,

Foreign

Foreign Attachment, &c. shall be tryed by the mouth of the Recorder. But the Issue whether there be a Market every day of the week in London shall be tryed per pais, because the issue is not upon the Custome. Rolles. tit. Tryals 580. vide hic cap. 8.

18. A matter of Record being mixt with a matter of fact, shall be tryed per pais, and not by the Record. Hob. 244. Peter and Staffords Case. Devant. 7. Matter of Record, mixt with matter of fact.

19. In Writs of Right, and Appeals that touch life, Tryal may be by Battel, or by Jury, at the Defendants choice; The Battel, in a Writ of Right, must be by Champions, (who must be Freemen.) But in an Appeal, it must be in proper person. The Champions, in a Writ of Right are not bound to fight longer than until the Stars appear; and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail: The Judges of the Court of Common Pleas, are Judges of the Battel, in a Writ of Right: and the Judges of the Kings Bench in an Appeal of Felony. It seems they seldom or never killed one another in this tryal of Battel, for their Weapons were but Batons, and he that was vanquished, was presently upon Proclamation made to acknowledge his fault, in the Audience of the people, or else to cry Craven in the name of Recreantise, &c. and upon Tryals by Battel. Writ of Right.

upon this, Judgement was to be given, and after this the Recreant should amittere liberam legem, that is, should become infamous, &c. 2 Institutes 247. Finch. 421. lib. 9. 31. Mirror of Justice 161, 162, &c. 1 Inst. 294.

Grand Assise. Glanvil saith, the tryal by Grand Assise came by the Clemency of the Prince. Est autem (saith he) Magna Assiza Regale quoddam beneficium, Clementia Principis, de consilio Procerum populis indultum.

For the Tryal of Treason, Murther, and Felony as well upon Appeals, as upon Indictments, see Stamford's Pleas of the Crown.

By Glanvil cap. 1. lib. 14. it appeareth the tryal of these Crimes by the old Law, was this; If there were no direct proof, nor accuser, or if there was any accuser, or direct proof, yet if the party denyed the same, then the tryal was by Wager of Battel, if the party accused was not 60 years old, and of sound Limbs; but if he was older, or not sound, then he was to be tryed per judicium Dei, namely, per calidum ferrum vel aquam, that is, if he was a Freeholder, he was to run bare foot, and bare legg'd over a row of hot Iron Barrs, and if he passed three times without stop or fall, he was acquitted. And if he

Per judicium Dei.

he was a meaner person, called Rusticus, he was to run through vessels filled with scalding water.

20. In a Writ of Disceit, upon a Recovery by default, the Tryal shall be, if the Judgment was given upon the Petit Cape, by the Summoners, if upon the Grand Cape, by the Summoners pernors, or veiors, and not per pais; So if a Recovery by default in a real Action be pleaded, to which the other saith, Nient compriſe, this shall not be tryed per pais, but by the Summoners and Veiors. lib. 9. 32. Recovery by default. Summoners pernors, veiors. Nient Compriſe.

En Assise if the issue be, whether the Land was extended in an Elegit, &c. This shall be tryed by the extendors joyned with the Assise. 31. Ass. 6. vide Rolls tit. Tryal 581, 582.

Of Tryals per L'escheator, per Examination, vide ib.

In an Appeal, if the Exigent be awarded, and the party pray a Writ to inquire of the goods and Chattles, and to seise them, this may be awarded to the Escheator, or Sheriff at the Election of the Court. 41. Ass. 13. vide hic cap. 24, 27. Escheator Sheriff.

21. In debt upon a simple Contract, Detinue, &c. The tryal may be by Wager of Law, Wager of Law.

Law, or per pais, at the Defendants Election. But when the Defendant wageth his Law, he ought to bring with him Eleven of his Neighbours, who will avow upon their Oath, that in their Consciences he saith true, so as he himself must be sworn de fidelitate, and the Eleven de credulitate. Ib. Finch 423. and 1 Inst. 295. you may read excellent Learning concerning this Tryal.

Profession. 22. If Profession be denyed, it shall be tryed by the Court Christian; But if the time of the Profession be in issue, this shall be tryed by the Country. lib. 4. 71. So

Inrollment. though an Inrollment, or other matter of Record, cannot be tryed per pais, yet the time when the Inrollment was made, may

Appearance. be tryed per pais. So whether the party appeared in such a Court, or on such a day, &c. shall be tryed per pais. Cro. 3. part. 131. So whether one was Sheriff

Sheriff. such a day or not. Cro. 1. part. 421. Admission,

Admission, &c. Institution, Plenarty, and Ability of the Parson, shall be tryed by the Bishop. But In-

Plenarty. duction shall be tryed by the Country, and so shall Avoydance by resignation. Dyer 229. Moor 61. And voyd, or not voyd shall be tryed per pais, 1 Inst. 344. And Plenarty, if the Clerk be dead, Mirror of Justice 324. li. 6. 49. The cause of refusal of a Clerk by the Bishop, shall by tryed by the Metropolitan, if the Clerk be living; but per pais, if he be dead. l. 5. 58.

Ability

Ability ſhall be tryed by the Ordinary, if the Clerk be alive, but if dead, then per pais. Inſtitution, reſignation, full or not full; Profeſſion, unleſs alledged in a Stranger. Prior removeable at will, or perpetual general Baſtardy, the Right of Eſpouſals, Divorce, &c. ſhall be tryed by the Biſhops: but in many caſes, theſe matters being mixed with other circumſtances, ſhall be tryed per pais.

Per ſpiritual Law. *Vide hic cap.* 16.

As if the Church be void by Reſignation, or void or not void, Induction, Inſtitution and Induction together, becauſe the Common Law ſhall be preferred, Prior or not Prior.

Per pais. For although Inſtitution, reſignation, *&c.* are Spiritual, yet avoidance, induction *&c.* are notorious to the Country.

Baſtardy alledged in a ſtranger to the Writ, or in one dead, or Abatement of the Writ. Whether a feme, be a feme covert in poſſeſſion, &c. in treſpaſs by Baron and feme, Nient Son feme ſhall be tryed per pais. And ſee in Rolls tit. Tryal 584. &c. Many caſes where Baſtardy, Marriage, &c. ſhall be tryed per ley ſpiritual, or per pais. The time &c. of Conſecration of a Biſhop, and of other ſpiritual matters, ſhall be tryed per pais. By what ſpiritual perſon the tryal ſhall be, and for what cauſe. vide ib.

Ideoty. 23. An Ideot, found so from his Nativity by Office, may come in person in the Chancery, before the Chancellor, and pray that before him, and such Justices or Sages of the Law, which he shall call to him (who are called the Council of the King), he may be examined, whether he be an Ideot, or no; or by his friends he may sue a Writ out of Chancery, returnable there, to bring him into the Chancery. Ibidem Coram nobis, & concilio nostro examinand. lib. 9. 31.

Sheriff. 24. If it be in question, whether the Sheriff made such a return or not, It shall be tryed by the Sheriff: If whether the Undersheriff made such a Return or not, it shall be tryed by the Undersheriff; If the question be, whether such a one be Sheriff or not, he is made by Letters Patents of Record, and therefore it shall be tryed by the Record. ib. Cro. 1. part. 421.

Retorn.

Dures. 25. If an Approver say, that he Commenced his Appeal before the Coroner per dures, this shall be tryed by the Record of the Coroner; and if it be found that he did it without dures, he shall be hanged, ib. Corone br. 75.

Statute. 26. The Tryal, whether a Statute shewed before, be the true Statute or not, shall be by the examination of the Mayor, and Clerk

Clerk of the Statutes, which took the Statute, and not per pais, ib. Whether a Statute hath two Seals or not, shall be tryed per pais, Leon. part. 228, 229.

27. In Assise the Tenant said, that the Lands were taken into the Kings hands, this shall be tryed by the Examination of the Escheator. Escheator.

28. If one in avoidance of an Out'awry, alledge that he was in Prison at Burdeaux, ultra mare in servitio Majoris de Burdeaux, this shall be tryed by the Mayor's Certificate; and in such like Cases, other Tryals shall be by the Certificate of the Marshal of the Host, and by the Captain of Calice, and also by Messenger, of a thing done beyond Sea. Ib. Certificate. Messenger.

29. At the Petit Cape, the Tenant said that he was imprisoned 3. days before the default, and 3. days after, this shall be tryed by the Examination of the Attorney; Nient Attach. per 15. Jours in Assize shall not be tryed per pais, but by examination of the Bayley. ib. Petit Cape. Bayley.

30. It seems an Almanack is so infallible, that it hath counterbailed the Verdict of a Jury. For in Error of a Judgment given in Lynne, the Error assigned was, that the Judgment was given at a Court held there on the 16th day of February, 26 Eliz. Almanack.

and that this day was Sunday, and it was so found by Examination of the Almanacks of that year: upon which it was ruled, that this Examination was a sufficient Tryal, and that a Tryal per pais, was not necessary, although it were an Error in Fact; and so the Judgment was reversed. Cro. 3. part. fo. 227. 1 Leon. 242. the same Case, and there it was said, it was twice so ruled before.

Ordeal. 31. In ancient times there was a tryal in Criminal Causes called Ordalium, for upon Not Guilty pleaded, the Defendant might put himself upon God and the Country (as is the use at this day) or else upon God only; and then if he was a Freeman, he was to be tryed per ignem, that is, he was to pass over Novem vomeres ignitos nudis pedibus, and if he was not hurt by this, then he was to be acquitted, otherwise condemned: and this was called Judicium Dei; But if he was a slave, then his tryal was to be per aquam, and that divers ways, which all appear in Lambard, verbo Ordalium. From which kind of tryal, I presume we still retain this expression of an innocent person, That he need not fear fire or water: this manner of tryal was first prohibited by the Canons, then by Parliament: The tryal by Battel is likewise prohibited by the Canons, but not by Parliament, as you may read in the ninth Report, fo. 32.

Battel.

and

and in the authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the authorities cited in that Book, which will avoid prolixity.

32. When the matter alledged, extendeth to a place at the Common Law, and a place within a Franchise, it shall be tryed at the Common Law. 1 Inst. 125. 4. Inst. 221. Which Tryal shall be first.

In what Cases a Tryal in one issue shall bind the same party in another issue, upon the same matter. Tryal in one issue binds in another.

In Debt against two per several Precipes, if one plead a release, and they are at issue upon the Deed, and the other plead the same issue, if it be found the Deed of the Plaintiff in the former issue, this shall bind him in the second issue, 12 H. 4. 8.

In trespass if the Defendant Plead villenage in the Plaintiff, if this be found against the Defendant, this shall bind him in the same issue, in another action in the same Court betwixt the same parties. 44. Ass. 5.

If a man be found guilty of a Conspiracy upon an Indictment at the Kings suit, this

this shall not bind in a writ of conspiracy at the suit of the Party, but he may plead not guilty. 27. Ass. 13.

If a man upon an Indictment of extortion confess it, and put himself in the Kings grace and makes fine, &c. this shall bind him, and he shall not plead not guilty to the suit of the party, for a confession is stronger than a Verdict. 27. Ass. 57. per Sharde. vide Rolls tit. Tryal 625.

In what Cases tryal against one shall be against others.

He which is not party to the issue nor can have attaint, or challenge the Inquest, shall not be bound by the Tryal. 11. H. 4. 30.

And therefore in Trespass against two, and one pleads a Release, and the other justifies as his Servant: If the issue be found against the Master, it shall not conclude the Servant. 11 H. 4. 30. Rolls ib. 625.

At what time the Tryal shall be.

One shall not be compelled to try a traverse the same Sessions he makes it, for a man shall have time to make his defence, and is not supposed to be ready to answer sudden objections, and for this reason many Judgments upon Indictments have been reversed.

Justices of Oyer and Terminer, nor Justices of Peace cannot inquire and determine the

the ſame day. But Juſtices of Gaol Delivery, and Juſtices in Eyre may.

Juſtices of Peace cannot proceed to the delibery of a perſon indicted of Felony before them, the ſame day he is arraigned. 22 E. 4. Coron. 44. Declared by all the Juſtices of England, to be obſerved as a Law. *ſid 334. lin.*

An Indictment in B. R. or in the ſame County and removed thither, the Defendant may be arraigned and tryed the ſame day. For the Kings Bench is a Court of Eyre for all Offences in that County, Otherwiſe of an Indictment removed out of another County. Vide Rolls tit. Tryal 626. many Caſes de eo.

33. All matters done out of the Realm of England, concerning War, Combate or Deeds of Arms, ſhall be tryed and termined before the Conſtable and Marſhall of England, before whom the Tryal is by Witneſſes, or by Combat, and their proceeding is according to the Civil Law, and not by the Oath of Twelve men, 1 Inſt. 74. 261. Therefore if the Kings Subject be killed by another of his Subjects in any Foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Conſtable and Marſhall, who ſentence upon the teſtimony of Witneſſes or Combat. ib. So if a man be wounded in France, and dye thereof in England. ib. 4. Inſt. 140. Marſhal Affairs. Witneſſes of Combate.

It

What Iſſue ſhall be firſt tryed.

It is worthy our obſervation, to take notice when there are ſeveral iſſues, which of them ſhall be firſt tryed; And for this you have already heard, that where iſſue is joyned for part, and a Demurrer for the Reſidue, the Court may direct the Tryal of the Iſſue, or judge the demurrer firſt, at their pleaſure, though by the opinion of Dodrige, It is the beſt way to give Judgment upon the Demurrer firſt, becauſe when the iſſue comes afterwards to be tryed, the Jury may aſſeſs damages for the whole.

Latch. 4.

Damages.

A Scire facias was brought on a Recognisance in Chancery, the Terre-tenants pleaded ſeveral Pleas, the Plaintiff demurred to one, and took iſſue on the other, the Record was ſent into B. R. to try the iſſue, and it was tryed, and Verdict pro Plaintiff, the demurrer not being argued, and it was adjudged per R. B. that Judgment ought to be given on both by that Court, Jeffreyſon and Dawſon's Caſe Hill. 21, 22 Car. 2. B. R. vide for theſe things 1. Roll. abr. 534, 535. Roll. rep. 287. and in the principal Caſe, 4 Inſt. 80. was denied to be Law.

Immaterial iſſue.

An Immaterial iſſue joyned, which will not bring the matter in queſtion to be tryed, is not helped after Verdict by the Statute of Jeofailes, but there muſt be a Repleader; becauſe this is matter of ſubſtance; for if there were no iſſue, there could be no Verdict,

dict, and so it is as if nothing had been done in the cause.

In an Action against two, the one pleads in abatement of the Writ, the other to the Action; the Plea to the Writ shall be first tryed, for if that be found, all the whole Writ shall abate, and make an end of the business; for the Plaintiff ought not to recover upon a false Writ. 1 Inst. 125. Plea to the Writ.

In a Plea personal against divers Defendants, the one Defendant pleads in barr to parcel, or which extendeth only to him that pleadeth it: And the other pleads a Plea which goeth to the whole: the Plea, that goeth to the whole, (that is) to both Defendants, shall be first tryed, because the other Defendant shall have advantage thereof; For in a personal Action, the discharge of one, is the discharge of both. Plea to the whole, first tryed.

As for example, if one of the Defendants in Trespass, pleads a Release to himself (which in Law extends to both) and the other pleads not guilty, (which extends but to himself;) or if one pleads a Plea which excuseth himself only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tryed; for if that be found, it maketh an end of all: And the other Defendant shall take advantage hereof, because the discharge Release. Rolls tit. Tryal 628.

Diſcharge of one diſcharg-eth both.

tharge of one, is the diſcharge of both. But in a Plea real it is otherwiſe, for every Tenant may loſe his part of the Land; as if a Præcipe be brought as Heir to his Father againſt two, and one pleads a Plea which extendeth but to himſelf, and the other pleads a Plea which extends to both, as Baſtardy in the Demandant, and it is found for him, yet the other iſſue ſhall be tryed; for he ſhall not take advantage of the Plea of the other, becauſe one Joyntenant may loſe his part by his miſ-plea.

Brown and Stamford Juſtices, conſulted with Grammarians in things of Grammar; and Hulls a Batchelor of Law (Tempore Hen. 6.) was called into Court, to ſhew the difference between præciſe and cauſative Compulſion. Vide Plow. 122. 127, 128.

Paſch. 16 Car. 2. B. R. An action of Trover, &c. was brought de ſex Capitalibus fibulatis, Anglice 6 laced Coifs; after Verdict for the Plaintiff, it was moved in Arreſt of Judgement, that the Latine words were both Adjective, and ſo not certain: but it was anſwered, that Capital is a Subſtantive, and the Nomenclator of Weſtminſter School was produced to warrant it, and it was adjudged for the Plaintiff accordingly, and the Court allowed that authority before Rider's Dictionary.

CAP.

CAP. III.

Of a *Venire facias*; To whom it ſhall be directed; when to the Sheriff, when to the Coroners, when to Eſliors, and when to Bayliffs. When well awarded. *&c.*

HAving given you the Epitome of what Tryals are allowed by the Common Law, and what ſhall be tryed per pais, and what not; we ſhall now apply our ſelves more particularly to the Tryal by Juries: And becauſe a Venire facias is the foundation and Cauſa ſine qua non, of a Jury, (I mean in Civil Cauſes; for in Criminals, as upon Indictments, the Juſtices of Gaol Delivery, give a general Command to the Sheriff, to cauſe the Country to come againſt their coming; and take the Pannels of the Sheriff without any proceſs directed to him; yet proceſs may be made againſt the Jury, though it is not much uſed. Stamford, Plees del Corone, 155.) I will firſt recite the Writ, in terminis, the rather, becauſe I intend to order my Diſcourſe, according to the method of the Writ.

Venire facias. *Rex* &c. *Vic. B. Salutem. Præcipimus tibi quod venire facias coram Juſticiariis noſtris de Banco apud* Weſtm. *tali die, duodecim liberos & legales homines de vicinet. de* C. *quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per annum ad minus, per quos rei veritas melius ſciri poterit; Et qui nec* D. E. *nec* F. G. *aliqua affinitate attingunt; Al faciend. quandam Jur. patriæ inter partes prædict. de placito, &c. quia tam idem* D. *quam prædict.* F. *inter quos inde contentio eſt, poſuer. ſe in Jur. illam. Et habeas ibi nomina Jur. illorum & hoc breve.* T. &c.

This is one of thoſe Latine Letters, (as Finch terms them, fo. 237.) which the King ſends with Salutation to the Sheriff. But withall Commands him, that he cauſe to come twelve free and lawful men of his County, to reſolve the queſtion of the fact, in diſpute between the parties, upon the iſſue; and it is a Judicial Writ, iſſuing out of the Record, for Plaintiff or Defendant, after they have put themſelves upon the Country: for upon the words Et de hoc ponit ſe ſuper patriam, by the Defendant, Or, Et hoc petit quod inquiratur per patriam, by the Plaintiff, and iſſue joyned thereupon, the Court awardeth the Venire facias, vid. Ideo fiat inde Jurat.

And

And if they come not at the day of the Writ returned, then shall go forth against them, an Habeas Corpora, and Distringas to bring them in to try the matter. The which two last Writs are usually made with this clause, Nisi prius Justiciarii venerint, &c. and are returnable after the time of the Judges coming their Circuit.

And first, you see it is directed Vicecomiti, i. e. to one who is Vicecomes, and hath the Regiment of the County, instead of the Earl of that County, to whom once it did belong: as we are taught in the Mirror, Chap. 1. Sect. 3. fol. That it appeareth by the Ordinance of ancient Kings before the Conquest, That the Earls of the Counties had the Custody or Guard of the Counties. And when the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called Vicecomites. Sheriff.

What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 Inst. 168. that he is Sheriff, that is, præfectus Comitatus, Governour of the County; For the words of his Patent be, Commisimus vobis Custodiam Comitatus nostri de, &c. And he hath a threefold Custody, triplicem Custodiam, viz. first, Vitæ Justitiæ, for no Suit be- What trust in the Sheriff.

begins, and no Process is served but by the Sheriff. And he is to return indifferent Juries for the tryal of mens Lives, Liberties, Lands, Goods, &c. Secondly, Vitæ Legis, he is after long Suits, and chargeable, to make Execution, which is the life and soul of the Law. Thirdly, Vitæ Reipublicæ, he is Principalis Conservator pacis, within the County, which is the life of the Commonwealth, for Vita Reipublicæ Pax.

To whom the Venire facias ought to be directed.

Yet notwithstanding the height and Latitude of this great Officers power and trust, the Law adjudges him in many cases not capable to do so much as return a Jury; For if he be of kindred by nature, or of affinity by Marriage to any of the parties, or (that I may say all in a little,) if he be not as indifferent almost in all respects as he is whom the Law allows to be a Juror, he ought not to meddle with the returning of the Jury. But the Venire facias shall be directed to the Coroners, (or to some of them, if the residue are not indifferent) who in that case are hac vice, Vicecom. And if the Coroners are not indifferent, then the Venire shall be directed Ad 2 Electores, that is, to two whom the Court shall chuse and deem fit to return the Jury; And to the return of these Elisors or Esliors, ab Eligendo, no Challenge will be admitted. Bro. tit. Venire facias 14. as to the Array; but to the Polles, 1 Inst. 158. If one of the Sheriffs of

Coroners.

Fortescue, cap. 2. 5.

Esliors.

Challenge. Sheriff of *London.*

of London be a party, then the Venire may be directed to the other Sheriff; if the Under-Sheriff be a party, yet the Venire may be directed to the Sheriff, with this Proviſo, Quod Sub-Vic. tuus in nullo ſe intromittat cum executione iſtius brevis. 18 E. 4. 3.

Judicial Writs (ſay Cook and Sanders, Plo. 74.) may be directed to the Coroners; As the Venire facias, where the parties are at iſſue; there, upon the ſurmiſe of the Plaintiff, that the Sheriff is his Couſin, and upon prayer that the Venire be directed to the Coroners, for avoydance of his own delay that might happen by the challenge of the Array, The Defendant ſhall be examined whether it be true, or not, and if he confeſs it, then the Venire ſhall be awarded to the Coroners; for then it appears to the Court by the Defendants confeſſion, that the Sheriff is not indifferent; But if the Defendant denies it, then the proceſs ſhall be awarded to the Sheriff, becauſe the Sheriffs Authority and profit ſhall not be taken away, without cauſe apparent to the Court; But if the Defendants will alledge any ſuch matter, and pray a Venire facias to the Coroners, there the Plaintiff ſhall not be examined, neither ſhall ſuch allegations be allowed, becauſe delays are for the Defendants advantage, and the Defendant may Challenge the Jury for

Suggeſtion.

Of whom.

Coroners.

So in Ejectment againſt four upon Affinity of the Sheriff to one of the Defendants. Rolls tit. Tryal 668.

Examination.

Not of the Defendants Suggeſtion.

The Defendant may not have a *Venire facias* to the Coroners.

for this cause, and so is at his prejudice.

And see in term. Hil. 3H. 7. fo. 5. placit. ult. In a quare Impedit, where the Defendant shewed how the Sheriff was Cousin to the Plaintiff, and prayed a Writ to the Coroners, but it was denyed him upon the same Reason. Fitz. tit. suggestion placit. 8. Br. Challenge 153.

In the Lord Brook's Case Trin. 1657. B. R. In Ejectment, the Court was moved, that Lord Brooks might be made Ejector, which was granted; then the Court was informed that the Lessor of the Plaintiff was High Sheriff of the County, and that the Coroner was Under-Sheriff, and it was prayed that Elizors might return the Jury; but the Court would not grant it at the prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Tryal by Nisi prius: but had it been in a Tryal at Bar, they would have granted it. But the regular course is, for the Plaintiff to pray it, or else the Defendant may challenge the Array at the Assises; for it's a principal challenge, that the Lessor of the Plaintiff is High Sheriff, or of kindred to the Sheriff, for which see Hutt. 25. More 470. Rolls rep. 328. And it was so adjudged, Trin. 15 Car. 2. B. R. Duncomb and Ingleby, that it is a principal challenge.

In

In Ejectment, the Plaintiff ſuggeſted that he and one of the Coroners, were all of the Liberty del Countee Wigorn', and prayed a Venire facias to the other Coroner; although this is no principal challenge, and the Defendant might have oppoſed the prayer, yet becauſe he confeſſed it, the Award was well to the Coroner. So if the cauſe be that one of the Coroners be retained of Counſel with the Plaintiff. If the ſuggeſtion do not comprehend a principal challenge, but only of favour, this is not ſufficient to award proceſs to the Coroners; but if it be a principal challenge, as affinity, &c. if the Defendant confeſs it, the award ſhall be to the Coroners; if he will not confeſs it, then to the Sheriff; and in ſuch caſe the Defendant ſhall never challenge the Array for that cauſe: ſo if the Plaintiff pray proceſs to the Coroners for favour in the Sheriff, if the Defendant ſay that this is not favourable, he ſhall never challenge for favour unleſs de puiſne temps. For what cauſes Proceſs ſhall be directed to the Coroners.

If the Array be quaſhed becauſe made by the Sheriffs Miniſter, who was aiding and of Councel with one of the parties, yet the Writ ſhall not be directed to the Coroners, but to the Sheriff, commanding him to make the Pannel by another Officer. As, Ita quod the Sheriff ne ſe intromittat, &c.

If the Tales be quashed for affinity in the Sheriff, but not the principal Pannel, because 'twas made before the affinity, yet all shall be awarded to the Coroners, Scil. the Distringas of the principal Pannel, and that they return a new Tales, for there shall be but one Officer if the Array be quashed, because made but by one of the Coroners, or for affinity in one, &c. Yet the Proces shall still go to the Coroners, Ita quod the Coroner se non intromittat.

To whom Proces shall be directed for default in the Sheriff and Coroners.

If Default be in the Sheriff and Coroners, the Court may choose two Esliors, and if the parties can say nothing against them, they shall make the Pannel.

But the Distringas shall not be directed to Esliers, for the Court cannot make Officers to distreyn the Kings Liege people, but the King may. 8 H. 6. 12. dubitatur.

Proces may be directed to the Justices of Assise, by assent of parties, not without. When a Pannel is made by the Esliors, they shall afterwards serve all Proces that comes upon this, as the Sheriff should. 15 E. 4. 24. 18 E. 4. 3, 8. Rolls tit. Tryal 670. For it may be the Sheriff will distreyn only those who are his friends, and be partial.

When

When the Proceſs is once awarded to the Coroners, for a default in the Sheriff, if there be a new Sheriff made afterwards, who is indifferent, yet the Proceſs ſhall not revert, but continue to the Coroners pendant le plea. 14 H. 7. 31. Bro. tit. Venire facias 17. So the Entry is, Ita quod Vicecomes ſe non intromittat. 18 E. 4. 3. 8 H. 6. 12.

Venire facias once directed to the Coroners, ſhall not be to the Sheriff afterwards.

And therefore where the Sheriff ought not to return the Venire, he cannot return the Tales. For in Error in the Exchequer Chamber of a Judgement in the Queen's Bench, the Error aſſigned was, becauſe the Venire facias was awarded to the Coroners, for Conſanguinity in the Sheriff; and it was returned by the Coroner, and afterwards a Tales was awarded, and it was returned by the Sheriff, and it was tryed, and a Verdict given, and Judgement. And for this cauſe held to be Erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgement was reverſed. Cro. 3. par. 574. Bro. tit. Octo. Tales 9.

Sheriff ſhall not return the *Tales*, where he cannot the *Venire facias*.

I will inſtance one Caſe more in the ſame Reports, fo. 586. becauſe it is very full in the point. After iſſue in Treſpaſs, the Plaintiff for his expedition ſurmiſed, that he was Servant to the Sheriff, which being confeſſed by the Defendant, the pro-

Where the Coroner returns the *Venire facias*, he ought to return the *Tales*.

teſs was awarded to the Coroners, and after Verdict, it was moved in Arreſt of Judgement, that the Tales de Circumſtantibus was awarded, and returned by the Sheriff; which was held by the whole Court to be good cauſe for Staying the Judgement: For it is a miſ-tryal, not aided by any of the Statutes; for proceſs being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other man. And proceſs ought always to be returned by him, who is an Officer by Law to return it, otherwiſe it is meerly void. But afterwards upon view of the Record, it appeared that the Tales was returned by the Coroners, and their names annexed thereto, wherefore it was without further queſtion. But the Court ſaid, if their names had not been annexed to the Tales, yet it had been well enough; for they be annexed to the firſt Pannel. And it ſhall be intended that the right Officer return'd it, and the uſual courſe is, That to ſuch Tales there is not any officers name ſubſcribed, and yet it is good enough; for it is not within the Statute of York, which appoints that the name of the Sheriff ſhould be ſubſcribed; but it was moved, that the Record of the Poſtea is, that the Tales were returned by the Sheriff; But the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgement.

No name to the Return.

But

But if the Venire be awarded to the Coroners, for default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a default discovered in the Coroners, de puisne temps, the party may shew this to the Court, and have a Venire awarded to the Sheriff, (if there be an indifferent one made in the mean time) or else to Elisors, & sicè converso.

Venire facias to the Sheriff, after one awarded to the Coroners.

In Error of a Judgement in Chester, the parties being at issue, a Venire was awarded to the Sheriff. And at the day of the Return, it was entred Quod Vicecomes non misit breve. And then the Plaintiff prayed a Venire facias to the Coroners, for Coverage betwixt him and the Sheriff, which was awarded accordingly; and at the day of tryal, the Defendant made default, and there upon Judgement, Error was assigned, because that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a Venire facias to the Coroners, without some cause de puisne Temps; sed non allocatur, because there was nothing done upon the first Writ. And the Defendant having made default, it was not material. Cro. 3. part. 853.

Venire facias to the Coroners, after one to the Sheriff.

But the Defendant might have demurred to this prayer; For if the Plaintiff pray a Venire facias to the Sheriff, he shall not chal-

No *Venire facias* to the Coroners, after one to the Sheriff.

challenge the Array nor have a Venire afterwards to the Coroners, because the Sheriff is his Cousin, or for any other principal challenge, whereof he might by common intendment have Conusance, when he so prayed the Venire facias; for upon shewing this Cause at first, he might have prayed Proces to the Coroners; but for a principal challenge, of which by common intendment the Plaintiff could not know at the first, as that the Defendant is of kindred to the Sheriff, &c. he may afterwards challenge the Array, when they appear, or if the Sheriff doth nothing upon the Writ, he may pray a new Venire to the Coroners. 15 H. 7. 9.

If the Defendant denies the Planitiffs suggestion, he shall have no benefit of it by Challenge.

If the Plaintiff prayes a Venire facias to the Coroner, because he is of kindred to the Sheriff, if the Defendant will not confess this, but denies it, this shall be entred, and the Defendant shall not challenge the Array for this cause afterwards. Br. tit. Venire facias 21. and 23.

By Consent, the *Venire facias* may be directed to a wrong Officer.

Mistryal without such consent.

If a Venire facias be awarded to the Coroners, where it ought to be to the Sheriff, or the Visne cometh out of a wrong place, yet if it be per assensum partium, and so entred of Record, it shall stand, for omnis consensus tollit errorem. 1 Inst. 126. li. 5. 36. But if it be directed to the Coroners, where it ought to be to the Sheriff, without

out such consent of parties: This is an insufficient Tryal, not remedied by any Statute, except it be upon an insufficient suggestion, and then the Statute of 21 Jac. 13. helps it.

Venire facias to some of the Coroners.

Upon suggestion that the Plaintiff and the Sheriff, and one of the Coroners are of kindred to the Plaintiff, or Defendant, or upon any other suggestion which contains a Principal challenge, the Venire facias may be directed to the other Coroners. Dier 367.

Bayliffs.

Error of a Judgement in Northampton, because in Northampton the Court being held before the Mayor, and two Bayliffs, the Venire facias upon the Issue was awarded to the two Bayliffs, to return a Jury, before the Mayor and Bayliffs, secundum Consuetudinem: which being returned, and Judgement given, the Error assigned was, because the Bayliffs being Judges of the Court, could not also be Officers, to whom Process should be directed, there being no Custome that can maintain any to be both Officer and Judge. But all the Court (absente Hide) conceived it might be good by Custome. And that it is not any Error, for the Judges be not the Bayliffs only, but the Mayor and Bayliffs; and it is a common course, in many of the Antient Corpora-

Judge and Officer to return Writs.

Corporations, where the Bayliffs are Judges, or the Mayor and they be Judges; yet in reſpect of executing Proceſs, they be the Officers alſo. And one may be Judge, and Officer diverſis reſpectibus, as in Redisſeiſin, the Sheriff is Judge and Officer: Whereupon Judgement was affirmed. Cro. 1 part. 138.

Venire facias to the Garden of the Palace of *Weſtminſter*. Rolls tit. Tryal 667.

In Treſpaſs and Aſſault laid in the Court, to be at the Palace of Weſtminſter, It was adjudged, that the Venire facias ſhall iſſue al Garden del Palace, and not to the Sheriff of Middleſex. Bro. tit. Ven. fac. 31.

Award of *Venire facias*.

In Treſpaſs againſt two, if one plead, and two iſſues are joyned upon his Plea, and two other iſſues are alſo joyned, and the Court award a Venire ad triandum exitum illum quam prædictum alium exitum inter the Plaintiff and the other Defendant, &c. This is a good award, although there be ſeveral iſſues betwixt the Plaintiff and both Defendants, becauſe that this word Exitus may be for all reddendo ſingula ſingulis. Hob. 91.

If an Inqueſt remain for default of Rapers, and a Decem Tales is awarded, and the Defendant ſaith for his delive-

rance

rance that he is Lord of the Rape, where, &c. and that all there are within his distreis, and prays a Writ to the next Hundred; The Court may try this by Tryors presently, without a return of the Sheriff, and if it be true may award to the next Hundred; otherwise if it be false. 3 H. 6. 39.

Prochein Hundred.

CAP. IV.

What faults in the *Venire facias* ſhall vitiate the Tryal, what not. When a *Venire facias de novo*, ſhall be awarded; when ſeveral *Venire facias*'s. When the *Venire facias* ſhall be betwixt the party and a ſtranger to the Iſſue; Who may have a *Venire facias* by *Proviſo*, and when.

Venire facias why the Writ ſo called.

WE have now ſhewed you to what Officer the Venire facias ſhall be directed; The next ſtep in the Writ is Præcipimus tibi quod Venire facias: Which words, Venire facias, are the moſt effectual words in the Writ, and therefore they give the denomination to the whole Writ. And here opportunity is offered us, to ſpeak ſomething of a Venire facias in general. I am not ignorant how our Books ſwarm with Caſes which ariſe from the defects in this Proceſs, and how that Verdicts have been ſet aſide, Judgements ſtayed, and reverſed, for want of ſufficient

cient Returns, miſawarding, diſagreement with the Rolls, diſcontinuance, and many other faults in this Writ. But the Statutes of Jeofailes (eſpecially the Statute 21 Jacob. cap. 13.) have pardoned (as I may ſo ſay) theſe enormities; As, the awarding this Writ, hab. Corpora, or Diſtringas to a wrong Officer, upon any inſufficient ſuggeſtion, or by reaſon the Viſne is in ſome part miſawarded, or ſued out of more places, or of fewer places than it ought to be, ſo as ſome place be right named, The miſnaming of any of the Jury, either in Sir-name, or addition in any of the ſaid Writs, or in any return thereupon, ſo that upon examination, it be proved to be the ſame man that was meant to be returned; or if no Return be upon any of the ſaid Writs, ſo as a Pannel of the names of the Jurors be returned, or annexed to the ſaid Writ; or if the Sheriff or Officers name, having the Return thereof, is not ſet to the Return of any ſuch Writ, ſo as upon Examination it be proved that the ſaid Writ was returned by the Sheriff, or Underſheriff, or ſuch other Officer. In all theſe Caſes, the Judgment ſhall not be ſtayed, nor reverſed for theſe defects.

Statute of *Jeofailes* 21 *Jac.* 13.

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony, or Murther, nor to any Indictment, or Preſentment of Felony or Murther, or Treaſon; nor to any Proceſs upon any of them;

them; nor to any Writ, Bill, Action, or Information upon any popular, or penal Statute: Wherefore since Informations, and popular Actions are grown so frequent, the Attorneys, &c. herein had best beware of these Jeofailes.

Popular Action, &c.

By this Statute, many defects are remedied, which were not by the Statutes of 32 H. 8. Cap. 30. and 18 Eliz. Cap. 14. yet all are not; for this Act only helps the mis-naming of a Juror in Sir-name, or addition, and saith nothing of his Christian name: wherefore I conceive the Law in Codwels Case, in the fifth Report, remains as it was then; which is, that if a Juror be mis-named in his Christian name, on the Venire, though he be named right in the Distringas, and Postea, yet this is ill, and not amendable; and with this agrees Goddards Case, Cro. 2. part. 458.

Christian name mistaken in the *Venire facias*, incurable.

And since the Court (Cro. 1. part, fo. 203.) doubted thereof, I may well put the Question, if a Juror be right named upon the Venire, and mis-named in his Christian Name, in the Distringas, &c. whether this is amendable, or not; without dispute, it is not by the Statute of 21 Jacob. for that only helps the Sir-name. But with Reverence to the Courts doubt, I conceive clearly, it is holpen by the Statutes of 32 H. 8. and 18 Eliz. as a dis-

Christian name right in the *Venire facias*, & wrong in the *Distringas*.

continuance

continuance of Proceſs; and I may with the more confidence believe it, becauſe in Codwels Caſe aforeſaid, where in the Pannel of the Venire, a Iuror was named Palus Cheale, and in the Diſtringas, &c. he was right named Paulus Cheale, and ſo becauſe he was miſ-named in his Chriſtian Name, in the Venire, Judgement was arreſted. But it is there adjudged, that if he had been well named upon the Venire, and miſnamed on the Diſtringas or Poſtea, then upon Examination, it ſhould be amended. But the Counteſs of Rutlands Caſe, lib. 5. 42. is expreſs in the point, and ſo is Cro. 3. part. 860. Rolls 196. Teppet in the Venire and Tipper in the Diſtring. Amended. And ſo if the miſtake be in the Pannel Jurata, the Sheriff may come in Court, and amend it. And ſo if Samuel be in the Venire and Diſtringas, and Daniel in the Nomina Juratorum, upon examination, this may be amended. And ſo if the name be right in the Ven. and miſtaken in the Chriſtian name in the Diſtringas or Poſtea it is amendable. Rolls 197. And ſo if he be De A, in the Venire and Diſtringas, and De B. in the Nomina Juratorum, this is amendable.

And it is to be known, that in moſt Caſes, where the Venire facias, Hab. Corpora, or Diſtringas be defective, they are to be amended; but if the Malady be ſo fatal in the Venire, that it cauſes a miſ-tryal, (as in the miſtake of a Jurors Chriſtian Name, or where a Juror not

Venire facias de novo.

not returned is ſworn, &c.) then the Verdict is to be ſet aſide, and a Venire facias de novo, to be awarded; and ſo was it to be upon thoſe miſtakes, (now amendable by the Statutes,) before the making thereof. And where a Jury giveth a Verdict which is accepted, and recorded by the Court, be the Verdict perfect or imperfect, the Jurors are diſcharged, and ſhall never try the ſame iſſue again upon a new Niſi prius. But if the Verdict be ſo imperfect, that Judgement cannot be given upon it, then the Court ſhall award a Venire facias de novo, to try the iſſue by other Jurors. li. 8. 65. Bulſtr. 2 part. 32.

One Jury ſhall not try a cauſe twice.

Venire facias de novo.

If upon an iſſue all the matter be not fully inquired, a Venire facias de novo ſhall iſſue. 18 E. 3. 50.

In an Audita Querela, if the parties go to iſſue upon payment according to the defeaſans of the Statute, and this is found for the plaintiff, but the Jury do not aſſeſs Damages, the Court ſhall award a Venire facias de novo, to aſſeſs damages. 22 E. 3. 5. vide hic cap. 6. and Rolls tit. Tryal. 593. 595.

If the Record of the Niſi prius be unum modum tritici for modium, and the Plaintiff is Nonſuit at the Aſſe, for this miſtake, if the Record in Court be right, ſcil. Modium,

Modium, this Nonſuit ſhall not be Recorded, but a Venire facias de novo ſhall be awarded. So for any other miſtake, as if the Record in Court be Grays-Inn Lane, &c. and the Niſi prius, which is but a tranſcript, be Graves-Inn Lane, &c. For this is a nonſuit upon another Record, than what is in Court.

In Battery againſt Three who plead Three ſeveral Pleas, and upon the Writ of Niſi prius, two iſſues are found for the Plaintiff, and Damages aſſeſſed; but nothing is found for the third iſſue, this is a miſ-trial, and a Venire facias de novo ſhall iſſue.

In Detinue, if the Jury find Damages and Coſts, but no value, as they ought, this ſhall not be ſupplied by a Writ of Inquiry of Damages, but a Venire facias de novo ſhall be granted. And ſo of other defects in finding the full iſſue. Detinue.

In a Quare impedit if the iſſue be found for the Plaintiff, but by negligence, the Jury do not inquire of the four points, ſcil. de plenitudine, ex cujus præſentatione ſi tempus ſemeſtre tranſierit, and the value of the Church per annum; This ſhall be ſupplied by a Writ of Inquiry, without any Venire facias de novo, becauſe the Court ex officio ought to have charged the Jury with the four *Quare impedit.*

four points of Inquiry, and if the Jury had found them, no Attaint lay; for as to this, they were but as an Inquest of Office.

Annuity. In a Writ of Annuity, if the issue be found for the Plaintiff, but the Jury do not assess Damages or Costs, this shall not be supplied by a Writ of Inquiry, but a Venire facias de novo shall be granted.

Ejectment. In Ejectment against Baron and Feme, and the Jury find the Wife not guilty, and find a special Verdict as to the Husband, which special verdict is afterwards adjudged insufficient by the Court, a Venire facias de novo shall be granted for both, as well the Wife as the Husband, and the Wife may be found guilty, because the Record and issue is intire, and the Verdict is insufficient and void in tout.

Imperfect Verdict. So if there be several issues, and the Jury find some well and directly, and in others special Verdicts which are imperfect, a Venire facias de novo shall be granted for all, and the Jury may find contrary to their first finding.

In trespass of Assault and Battery, and taking away of grain, and the Defendant as to the Batery justifies in defence of

of his grain, upon which the Plaintiff demurs, and as to the grain he pleads not guilty, which is found for the Plaintiff, and the Jury do not tax Damages for the Battery depending in demurrer as they ought, in this case, if the demurrer be afterwards adjudged for the Plaintiff, yet the Damages for this cannot be afterwards supplied and taxed by a Writ of Inquiry of Damages, but a Venire facias de novo shall issue to Tryal, because all is comprised in one Original. Vide apres cap. 13. and devant cap. 2.

Who shall grant it?

In a Scire facias upon a Recognisance in Chancery, if the Parties be at issue, upon which the Record is commanded into B. R. and there it appears that the Venire facias is not well awarded, the Venire facias de novo shall be awarded in the Kings Bench, and not in the Chancery. Roll. tit. Tryal 723.

In Yelverton's Reports, fo. 64. the Case is, That a Venire facias was made Vicecomiti, leaving out Salop, for which there was a blank left in the Writ. But re vera, it was returned by the Sheriff of Salop. In Arrest of Judgement it was alledged, that the Venire facias was vicious for this cause; But Gawdy said, it should be amen-

Album breve, the County left out in a *Venire facias*.

ded; and by Fenner and Williams; It is as no Writ, because it is not directed to any Officer. And then it is aided by the Statute of Jeofailes, For it might rather be called a blank, than a Writ, because it was directed to no Officer. If there be no return of the Sheriff indorsed upon the Venire facias, it was held not amendable. 35 Eliz. lib. 5. 4 Otherwise of the Distringas, if that be Album breve, and no return, if the Venire facias be Right. Rolls tit. 204.

Several *Venire facias.*

In Cases where there are several Defendants, who plead several Pleas, the Plaintiff may chuse either to have one Venire facias for all, or several, for every one of the Defendants; But (if you will be ruled by Stamford) the surest way is to have a Venire facias against every one, and then one cannot have benefit of the others Challenge: neither shall the death of one abate the Venire facias against the other; (This he speaks of in Appeals) But if the Court once award a joynt Venire facias, you cannot have several Venires afterwards, though there be nothing done upon the first; except it be upon matter de puisne Temps, as the death of one of the Defendants, &c. lib. 8. 66. lib. 11. 5, 6. Stamf. 155. Bro. tit. Venire facias 2. 35.

But now it is the usual course to have but one Venire facias upon several issues, though

though against ſeveral Defendants, Cro. 3. part. 866. Hob. 36. 64. And ſo uſual, that the Court declared, Cro. 2. part. 550. That there never ſhall be ſeveral Venire facias to try ſeveral Iſſues in one County; For what need the Plaintiff trouble himſelf, and the Country, with ſeveral, when one Jury will ſerve his turn; Et fruſtra fit per plura quod fieri poteſt per pauciora. But otherwiſe, if it be in two Counties. Cro. 3. part. 866.

One *Venire facias* in ſeveral iſſues. Vide Rolls tit. Trial 596. 620. 667. Hob. 88. 51.

After iſſue joyned by two Defendants, if one of them die, and then a Venire facias is awarded betwixt the Plaintiff, and both the Defendants, and ſo in the Hab. Corpora and Diſtringas, yet this ſhall not vitiate the Venire facias, &c. to make Error; becauſe though one of the Defendants be dead, yet the other being alive, it is ſufficient. And there needs be no ſurmiſe in Judicial Writs, that one of the Defendants is dead; It is time enough to ſhew it to the Court at the day in bank. Cro. 1 part. 4. 26. But if there be two Defendants, and the Venire facias be but againſt one of them, 'tis Error, 7 H. 4. 13. and Bro. tit. Ven. fac. 11. Cro. 1. part. 426.

Venire facias between the Plaintiff and 2 Defendants where one is dead.

No ſurmiſe in Judicial Writs of death in one of the parties.

If the Venire facias bears date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of

Venire facias dated before the Action brought.

Jeofailes.

Jeofailes. Cro. 1. part. 38. 90. 91. 203, 204. Miſcontinuance or diſcontinuance, or miſconveying of Proceſs, is aided by 32 H. 8. 30. The want of any Writ Original or Judicial, defaults in their form, and inſufficient Returns thereupon, are aided by 18 Eliz. 14. Cro. 3. part. 259. But you muſt have a care the Venire facias be not faulty in any other matters of Subſtance; for if the parties names be miſtaken, or the iſſue, as if the iſſue be ne unques Executor, and the Venire facias be in placito debiti, &c. this is a Miſtrial. Cro. 2. part. 528. So it is, if the Venire facias be in placito tranſgreſſioni, where the Action is in placito tranſgreſſionis, & ejectionis firmæ. This miſawarding of Proceſs is not aided by any of the Statutes, and better it were, that there had been no Venire facias at all in ſuch a Caſe; for then the Statutes would have holpen it. Cro. 3. part. 622.

Parties names miſtaken in a *Venire facias.*

Miſ-tryal.

No Venire facias holpen.

Return of Proceſs.

If a Venire facias be directed to the Coroners, all the Coroners ought to joyn in the return, they being Miniſters, not Judges, and ſo both of the Sheriffs of London ought to joyn, or elſe the Return is not good. Hob. 97.

Note, the Principal Statutes of Jeofailes are 8 H. 6. cap. 12. and cap. 15. 32 H. 8. cap. 30. 18 Eliz. cap. 14. 21 Jac. cap. 13. and 16 and 17 Car. 2. 8. Intituled an Act

to

to prevent Arrests of Judgements and soperseding Executions. And the three first of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or to any proceedings upon them, for these are excepted, nor to the amendment of any Exigent, to make any one Outlawed. As you may see at large, lib. 8. 162. Blackamors Case.

And the four last of the said Statutes do neither extend to them nor to Actions, or informations upon Penal Laws. Only in the last of them, viz. 16, 17 Car. 2. there is a limitation in the negation of the Extent, scil. Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.

If the Venire facias be directed Vicecomiti London, Salutem, &c. præcipimus tibi, and not vobis, after Verdict this is Amendable. 39 Eliz. B. R. Adjudge, Rolls 200.

And so it is, if after & habeas ibi hoc breve, & Nomina Juratorum be left out. ib. and 204.

But if the date of the Teste be after the return, this was held not amendable, 32, 33 Eliz. B. R. ib. sed vide hic ante. But if the Award of the Ven. fac. upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the mispriſion of the Clerk. ib. 201.

If

If the words, quorum quilibet habeat he left out, or duodecim, or qui nulla affinitate attingunt, or Vicecomiti be left out, these are amendable, as mistakes of the Clerk. Rolls 204, 205.

Venire facias between a party and a stranger.

In some Cases a Venire facias shall be awarded to make an Enquest betwixt a stranger to the Writ and issue, and the party. I will instance but in one, and that is upon the Statute of Westm. 2. cap. 6. If a Tenant being impleaded vouch to warranty, and the Vouchee denieth the Deed, or other cause of the Warranty, &c. That the Demandant may not hereby be delayed, he may sue out a Venire facias to try the issue between the Tenant and Vouchée.

Inquest at whose request.

Inquests in Pleas of Land, shall be as well taken at the request of the Tenant, as of the Demandant. 2 Edw. 3. cap. 16.

Venire facias by Proviso.

If the Plaintiff, or Demandant, desisteth in prosecuting his Action, and bringeth it not to Tryal, then the Defendant, or Tenant may sue forth a Venire facias with a Proviso, which is to no other end but that the Sheriff should summon but one Jury, if the Plaintiff also should have brought him another Writ, to the same purpose; And although, (as my Lord Dyer saith, fol. 215.) the granting of this Venire facias, &c. with a Proviso, depends much upon

upon the discretion of the Court, yet for the greater part, it is not grantable for the Defendant, unless when he is actor as well as the Plaintiff, or unless there be a default, and Laches in the Plaintiff; therefore there can be no Tryal by Proviso against the King (unless with the Attorney General's consent,) because no default, or Laches can be imputed to the King. But an avowant in Replevin, may have a Venire facias with a Proviso, immediately after issue joyned, because he is Actor, and in nature of the Plaintiff. Proof presently after issue joyned.

If the Plaintiff in Detinue, and the Garnishee be at issue, and the Plaintiff prays a Nisi prius, and this is granted, yet the Garnishee at the same time may have a Nisi prius with Proviso because he is Plaintiff also. 19. li. 6. 46. Rolls tit. Tryal 629. Garnished.

If the Plaintiff deliver the Writ to the Sheriff tarde, so late that he cannot serve it, the Defendant shall have a Writ with a Proviso. Tarde.

But at the same time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleases at his Election. 8 H. 6. 6.

The Proviso ought to be, quando duo brevia

brevia ſunt in eodem gradu & qualitate.

If the default be in Plaintiff after iſſue in the proſecuting of the Venire facias, then the Defendant may have a Venire facias with Proviſo, but not a Hab. Corpus with a Proviſo until the Plaintiff have made a default in the ſame Writ, for he ought only to have the ſame Proceſs with a Proviſo, in which there was a default of the Plaintiff firſt: and therefore although the Defendant had a Venire facias with a Proviſo upon a default of the Plaintiff, yet he cannot have a Niſi prius by Proviſo without another default of the Plaintiff.

If the Defendant had a Hab. Corpus by Proviſo and the Jury remain for want of Purveyors, yet he cannot have a Diſtringas Jur. with a 10. Tales cum Proviſo, until a default of this requeſt of a Tales, is in the Plaintiff. D. 15 El. 318. 10.

How the Plaintiff may ſtop the Defendants Proviſo.

But note the Note (in Stamford's Pleas, del Coron. fol. 155.) That if by negligence of the Plaintiff, the Defendant ſues a Venire facias with a Proviſo, yet the Plaintiff may at his pleaſure ſtay the Defendant, that he ſhall not proceed in his Proceſs, in praying a Tales upon the Defendants Proceſs, as it appears T. 15 H. 7. fol. 9. And the Defendant ſhall never be received to purſue this Proceſs with a Proviſo,

viſo, ſo long as the Plaintiff purſues, or is ready to purſue, as appears Mich. 14 H. 7. fol. 7.

And ſeeing the Tales men offer themſelves to us, we will tell them upon what accompt they come, before they thruſt themſelves into the Inqueſt, commonly for the love of eight pence; but it may be, to do ſome of their Neighbours a ſhrewd turn. *Tales men.*

CAP. V.

Why the *Venire facias* runs to have the Jury appear at *Weſtminſter*, though the Tryal be in the Country. Of the Writ of *Niſi prius*, when firſt given, when grantable, when not, and in what Writs. Of Juſtices of *Niſi prius*. Of the *Tales* at Common Law, and by Statute. When the Tranſcript of the Record of the *Niſi prius* differs from the Roll, whereby the Plaintiff is Non-ſuited, he may have a *Diſtringas de novo*.

BUt to obſerve the Method of the Writ, the next words are, Coram Juſticiariis noſtris de Banco apud Weſtminſt. tali die. And here firſt of all, you may aſk me, to what purpoſe the Sheriff is commanded to cauſe the Jury to come to Weſtminſter, when they are to try the Cauſe in the

the Country, and in truth are not to come to Westminster? I must confess the resolution of this question is not unnecessary: wherefore we must know, that Originally, before the Writ of Nisi prius was given, the purpose for which the 12. men were to be summoned upon the Writ of Venire fac. to come to Westminster, was that contained in the Writ, videl. Ad faciend. quandam Juratam; for then was the Tryal intended to be there, if a full Jury appeared; if not, then a Hab. Corpora, (with a Tales sometimes annexed to it, the form whereof you may see in the Register) and if they did not appear at the Return in the Hab. Corpora, then went out the Distringas. This I speak of the Common Pleas: But the course of the Kings Bench, and Exchequer, is, after the Venire fac. to have a Distringas, leaving out the Hab. Corpora. Tryals then were all at the Bar. (I speak not of Assises.) But now, because Jurors did not use to appear upon the Venire facias, it being without penalty; Tryals at the Bar, are appointed upon the Hab. Corpora, and Distringas, because the Jury will more certainly appear at the day in the Distringas, through fear of forfeiting issues: which the Sheriff returns on the Distringas, not on the Venire facias. By the Statute of 18 Eliz. cap. 5. no Jury shall be compelled to appear at Westminster, for the Tryal of an offence (upon any penal Law)

Why the *Venire facias* is to have the Jury appear at *Westminster*.

Hab. Corp.

Distringas.

Tryals at Bar.

Where a Jury is not compellable to appear at *Weſtminſter.*

committed above 30. miles from Weſtminſter, except the Attorney General can ſhew reaſonable cauſe for a Tryal at Bar.

Thus it was at Common Law, before the giving of the Writ of Niſi prius, when all Jurors, together with the parties came up to the Kings higher Courts of Juſtice, where the Cauſe depended; which (when Suits multiplyed) was to the intolerable burthen of the Country 27 E. 1. cap. 4. Wherefore by the Statute of Weſtminſt. 2 cap. 30. A Writ of Niſi prius was firſt given; and that, in the Venire facias, as we may ſee in the form of the Writ there mentioned, ſcil. Præcipimus tibi quod venire facias coram Juſticiariis noſtris apud Weſtmon. in octabus Sancti Michaelis, niſi talis & talis tali die & loco ad partes illas venerint 12. &c. By which Writ it appears, that the Venire facias was not returnable, till after the day of the Niſi prius. But the miſchief thereof was ſo great, partly in reſpect that the parties not knowing the Jurors names, could not tell how to make their Challenges, and ſo were ſurpriſed; and partly, in reſpect of the Jury, who were greatly delayed by the Eſſoyns of the parties, that by the Statute of 42 E. 3. cap. 11. It is Ordained, that no Inqueſt, but Aſſiſes and deliverances of Gaols, be taken by Writ of Niſi prius, nor in other manner, at the Suit of

Niſi prius, when firſt given, and wherefore.

Stamfords Pleas of the Crown. 156.

Niſi prius in the *Venire facias.*

of the great or ſmall, before that the names of all them that ſhall paſs in the Inqueſts, be returned in the Court. And their names must be returned upon a Pannel annexed to the Venire facias, ſo that either party may have a Copy of the Jury, that he may know whom to challenge; And the Jury not coming upon the Venire facias, make a feigned default, which warrants the Diſtringas, &c. unleſs they appear at the day of the Niſi prius.

The names of the Jurors muſt be returned into the Court before any Tryal, and why.

So that by what hath been ſaid, you may perceive to what purpoſe the Sheriff is commanded to cauſe the 12. men to come to Weſtminſter, though the Tryal be in the Country. And that, ad faciend. quandam Juratam, becauſe it is in the diſcretion of the Court, whether to grant a Writ of Niſi prius, or to have a Tryal at the Bar. And for this, the Duke of Exeter being Plaintiff in Treſpaſs, a Niſi prius was prayed for the Duke, and it was denyed, for that the Duke was of great power in that County. And if the Tryal ſhould be had in the Country, inconvenience might thereupon follow, as you may read, 2 Inſt. 424. and 4 Inſt. 161. Nay in ſome Caſes, (as if the Cauſe require long examination, &c.) it is not in the power of the Court to grant a Niſi prius, if the King pleaſe: For in ſuch Caſes, (as it appears by the Writ in the Regiſter, 186.) the King by his Writ may reſtrain, and

It is in the Courts diſcretion, whether to grant a *Niſi prius*, or not.

When the Court cannot grant a *Niſi prius*.

and command the Justices, that they shall not award any Writ of Nisi prius, and if they have, that they supersede it. F. N. B. 240. 241, No Nisi prius shall be granted where the King is party, without especial Warrant from the King, or the Attorney Generals consent. Stamf. 156. F. N. B. 241. 4 Inst. 161.

Where the King is concerned.

In a præcipe quod reddat, if the Tenant after aid of the King, pleads to the Inquest; the Plaintiff shall not have a Nisi prius, because the Tenant hath aid of the King, and so the King is in a manner Party. 25 E. 3. 39. Neither is a Nisi prius to be granted, if any of the parties may have prejudice by it.

Certification of Verdicts.

If the Justices de Nisi prius die before the day in Bank, yet the Record shall be received from the Clerk of Assise, without a Certiorari, or other form of entry but the antient form.

Also in that Case a Certiorari* may be directed to the Executors or Administrators of the Justices, to certifie the Record. D. 4, 5 Mar. 163. 55. Rolls tit. Tryal 629.

What things the Justices of *Nisi prius* may do.

They have no power to increase Damages, nor to allow or disallow protections, nor to allow a Plea of Excommengement in the Plaintiff. But they may record the

the protection and the default, and this shall be allowed or disallowed in B.

They may demand the Jurors upon a Pein, they may amerce Jurors, and punish a Trespass done in their presence, which is in despite of the King, and for this make Process, and may fine Offenders. Jurors sur paine fine.

In Ejectment the Defendant may plead at the Assises, that the Plaintiff hath entred into parcel of the Land mentioned in the Declaration puis le darrein continuance, and the Justices of Nisi prius may accept this Plea. But it is in their Election; for if they perceive the Plea is dilatory, they may refuse it, for it is in their discretion. Sir Hugh Browns Case in Scaccario. Mich. 8 Jac. Rolls tit. Tryal 630. Plea puis darrein continuance.

If 11 Jurors be sworn, and the 12th. is challenged, and the Jurors cannot agree in the challenge; for 10 affirm the challenge, and the other denies it: although the party which did not take the challenge, will not agree that the Eleven sworn shall have another to them in the lieu of him that is challenged, yet the Court may do this. The power of the Judge upon disagreement or other matter. Challenge.

If a challenge be taken to the Array before any Juror is sworn, and Triors be chosen, who cannot agree, yet they shall not be commanded in Custody, because they never were sworn upon the principal.

But

But the Court may discharge them and chuse others.

Jurors discharge.

If there be three Triors who will not agree, the Court cannot take the Verdict of two, and command the other to prison. The same Law in case of a Verdict upon an issue.

Where 14 Jurors are impannelled for the King, the Judge cannot discharge any of them after they are sworn, if not that they will not agree with their Companions.

Amencement.

If the Jury say upon demand of the Court, that they are agreed, and afterwards when they are opposed, they say the contrary in any matter, they may be amerced for this. Rolls tit. Tryal 675.

Nisi prius why so called.

And now since the Nisi prius (for so it is called, because the word prius is before venerint, in the Distringas, &c. which was not so in the Venire facias, upon the Statute of W. 2. cap. 30. before rehearsed,) must not be in the Venire facias, because the names of the Jurors are to be returned to the Court, before the granting of the Nisi prius; therefore the Nisi prius is now in the Hab. Corp. and Distringas. And if the Sheriff return not a Pannel of the Jurors;

No *Nisi prius* before the *Venire facias* is returned.

rors, upon the Venire facias, there shall be no Nisi prius upon the Tales, until a Pannel be returned. 27 H. 6. fol. 10. 1 H. 5. fol. 11. which brings me again to speak of the Tales.

A Tales is a supply of such men, as were impannelled upon the Return of the Venire facias, grantable, when enough of the principal Pannel to make a Jury do not appear, or if a full Jury do appear, yet if so many are challenged, that the residue will not make a Jury, then a Tales may be granted. And this at Common Law was by Writs of Decem tales, Octo tales, &c. (out of the Kings Courts) one of them after another, as there was need, untill there was a full Jury. But now by the Statutes of 35 H. 8. 6. 4, 5. P. M. 7. 5 Eliz. 25. and 14 Eliz. 9. The *Tales* at Common Law.

The Justices of Assise, and Nisi prius, at the Request of Plaintiff, or Demandant, Defendant or Tenant, or of the prosecutor tam quam, (if two, more, or but one of the principal Pannel appear at the day of Nisi prius,) may presently cause a supply to be made of so many men as are wanting, of them that are there present standing about the Court; and hereupon the very Act is called a Tales de circumstantibus. *Tales* by Statute.

Note the difference between Tales at Common Law, and Tales by the Statute,

the first called only [Tales], the second, [Tales de circumstantibus], the last of which can't be granted at a Tryal at Bar, which is a Tryal at Common Law; for there it must be only [Tales] by Writ annexed to the Venire facias. But Tales de circumstantibus is given by Statute to Tryals by Assise and Nisi prius, per Stat. 35 H. 8. 6. Yet such a Tales to an indictment in Wales, was out of that Statute, and helped by 4, 5 Ph. Mar. 7.

Tales in what Cases it shall be granted.

If the Issue be to be tryed per two Counties, and one full Inquest appear of one County, but the Inquest remain for default of Jurors of the other County, A Tales shall be awarded to the County where the default is, not to the other.

If a Juror die after he is Impannelled, a Tales shall issue, not a Venire facias.

What persons may have a *Tales*.

Upon a Pluries Distringas, there only appear, the Plaintiff prays another Distringas, without praying a Tales, yet if the Defendant pray a Tales, the Court ought to grant it. D. 20 El. 359. 2.

In what Cases.

A Tales shall be granted in an Attaint, if all the Grand Jury make default.

At what time.

It cannot be granted at the day of the return of the Venire facias.

If

If the Venire facias be good, and the Hab. Corpus, ill, if the Pannel be affirmed, yet the Tales is void, for in effect there is only a Venire facias returned, and then no Tales.

If the Defendant hath a Hab. Corpus with a Proviso, yet the Tales ought not to be granted with a Proviso at the Defendants request, before a default in the request of a Tales in the Plaintiff. Tales with a Proviso.

At Common Law before the Statute by Custom of a Court a Tales de circumstantibus might be granted, for this is a good Custom. Dubitatur, Rolls tit. Tryal 672.

If great persons are concerned, and by their labouring the Jury doth not appear, and Tales men are prepared for their turn, and there is a great tumult de circumstantibus; The Justices of their discretion may deny a Tales, and adjourn in Bank, notwithstanding the Statute. The principal Pannel must stand, or else there can be no Tales. Tales denyed.

If the Bayliff of the Franchise answer, that there be not sufficient of his Bayliwick, the Justices may award a Tales de circumstantibus to be returned by the Sheriff.

If the Tenant for life pray in aid of

the King who hath the reversion, the Justices cannot grant a Tales de circumstantibus, because the King is concerned.

If two Coroners or Esliers return the Pannel, one of them cannot return the Tales, &c.

If the Defendant sue the Writ of Nisi prius by Proviso, yet the Plaintiff may have a tales, &c.

The Sheriff may return 24. 40. or any number upon the Tales de circumstantibus.

Attorney. And it may be prayed by Attorney, (although the Statute doth not mention an Attorney) as well as in proper person. The Vouchee in a præcipe quod reddat may pray a Tales, though he be neither Plaintiff nor demandant, in the first action.

If there be three Plaintiffs in Replevin, &c. and one of them makes default at the Nisi prius, the other two cannot pray a Tales: otherwise of two Coparceners.

Mayor and Commonalty, in their proper persons cannot pray a Tales. A Bishop or Abbot may.

Two Plaintiffs in Trespas and at the Nisi prius the Defendant shews a Record to the Court, by which it appears that one of the Plaintiffs was Outlawed after the last continuance,

continuance, the other cannot pray a Tales.

The Sheriffs upon the Tales de circumstantibus may Impannel a Priest or Deacon, if he hath sufficient freehold of Lay Fee, but not an Infant, nor one of the age of 80 years.

He may Impannel Coroners, Capital Ministers of any Corporation, Forresters, men blind, mute, (if they have their understanding, but not Deaf men) Excommunicated persons, but not Outlawed or attaint, not Aliens, nor Clerks attainted, nor persons attainted of false Verdicts. What persons of the Tales.

The Coroners may put the Sheriff on the Tales.

It seems by the Statute, none of the parties can challenge the Array of the Tales, but only to the Poll. Challenge.

After a challenge to the Poll tryed, there shall be no other challenge to the same Poll, for any cause or matter that is at the same time.

In an action of Trespass, for taking away the Plaintiffs money, one of the Tales was challenged, because he was a common Fosterer of Thieves, and dwelt in a suspicious place, and of ill fame, and held a good challenge.

For Challenges see the Tit. Challenge at large.

What

What issues shall be tryed by Tales de circumstantibus, see Williams his reading, & hic cap. 7.

But since none can come after the Reporter, observe with me his Nota Lecteur, in his 10th. Report 104. That at Common Law, in the granting of a Tales, five things are to be considered.

1. The time of the granting, &c. thereof.

2. The number of the Tales.

3. The order of them.

4. The manner of Tryal, that is, where by them with others, and where by them only.

5. The quality of them is to be considered.

As to the first, 4 things are likewise to be considered.

1. That the time of granting them is upon default of so many of the principal Pannel, that there cannot be a full Inquest.

2. That at the time of granting them, the principal Array stand; for Tales are words similitudinary, and have reference to the assem-

assemblance, which then ought to be in esse; and therefore if the Array be quashed, or all the Polls challenged and treited, no Tales shall be awarded, for then there are not Quales, but in such a Case, a new Venire facias shall be awarded. But if at the time of granting the Tales, the principal Pannel stand, and afterwards is quashed as aforesaid, yet the Tales shall stand; For it sufficeth if there were Quales, at the time of granting the Tales.

3. It is to be observed, that he which is meerly Defendant, cannot pray a Tales till the Plaintiff hath made default.

4. In some Cases, a Tales shall be granted after a full Jury appear and is sworn; as if a Jury be charged, and afterwards before a Verdict given in Court, one of them die, a Tales shall be awarded, and no new Venire facias: and so if any of the Jurors Impannelled die before they appear; and this appears by the Sheriffs return, the Pannel shall not abate, but if there be need, a Tales shall be awarded. And the time for Challenge, and Tryal of the Tales, is after the principal Pannel be tryed; and if the principal Pannel be affirmed, the same Tryors shall try the Tales; But if it be quashed, then the two Tryers of the Principal shall not try the Tales.

As

As to the second, to wit, the number; two things are to be observed.

1. That in all Cases, the Tales ought to be under the number of the principal in the Venire facias, (unless in Appeals) as in Attaint under 24. and in other Actions where the Venire facias is of 12. under 12. And the reason wherefore more than the number may be granted in Appeals of the Plaintiffs part, is, because the Defendant may challenge peremptorily; and if default be in the Plaintiff, then the Defendant may pray a Tales, and the Reason is in favorem vitæ, and that he may expedite and free himself from vexation and the question of his life, for fear that his Witnesses should die.

2. That the number ought always to be certain, as 10. 8. 6. or 4. &c. But now by the Statute of 35 H. 8. a Tales de circumstantibus may be granted, as well of an uncertain as a certain number, and that by force of these words in the Stat. 35 H. 8. So many, &c. as shall make up a full Jury.

As to the third, to wit, the Order, It is to be known, that always in every new Tales, the number shall be diminished, as if the first be 10. the second shall be 8. and so always less. But if the Tales awarded be

quashed

quashed by Challenge, you may have another of the same number.

As to the fourth, to wit, the manner of Tryal, that is commonly by them with others; but by them only, when after the granting the Tales, the principal Pannel is quashed, then the Tryal shall be only by the Tales; or if the Tales do not amount to a full Inquest, another Tales to supply the former, may be granted.

As to the fifth, to wit, the Quality of the Tales, they ought to be of the same Quality as the Quales are; and therefore if the first be per medietatem linguæ, of English and Aliens, so ought the Tales to be, so if the Principal be out of a Franchise; so if the Venire facias be directed to the Coroners, so ought the Tales; and all things which are required by the Law, in the Quales, are required in the Tales: As you may read in the aforesaid Statutes. vide Stamf. Plees del Corone, fol. 155.

Therefore if the *Venire facias* be not *de medietat. linguæ*, the *Tales* cannot. 3 E. 4. 12.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Tryal again, he may have a Distringas, &c. with a Decem Tales.

By the Statute of 23 H. 8. cap. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where

Attaint.

such Attaint is taken; a Tales may be awarded into the Shire next adjoyning.

Nisi prius. amendable.

If the Transcript of the Record of the Nisi prius be mistaken, and not warranted by the Rolls, for which cause the Plaintiff becomes Non-suit, he may have a Distringas de novo, upon motion to the Court, and the Postea shall not be recorded, Cro. 1. part. 204. Palmers Reports. 378. For there is but a Transcript of the Record sent to the Justices of Nisi prius. First they were Justices of Assise, and therefore they retain that name still, though Assises are very rarely brought: For this common Action of Ejectment hath Ejected most real Actions; and so the Assise is almost out of use.

Justices of *Nisi prius*, and Justices of Assise.

CAP.

CAP. VI.

Of the number of the *Jurors*, and why the Sheriff returns 24. though the *Venire facias* mentions but 12. If he returns more or leſs, no Error, and of the number 12. And when the Tryal ſhall be *per primer* Jurors. And of Inqueſts of Office; and when to remain *pro defectu Juratorum*.

NOw for the Quales: and theſe you ſee for number, muſt be 12. by the Common Law, D. and St. fol. 14. for quality, liberos & legales homines. And firſt of their number 12. And this number is no leſs eſteemed of by our Law than by Holy Writ; If the 12 Apoſtles on their 12 Thrones, muſt try us in our eternal State, good Reaſon hath the Law to appoint the number of 12. to try our temporal. The Tribes of Iſrael were 12. the Patriarchs were 12. and Solomons Officers were 12. 1 Kings 4. 7. vide Sir Hen. Spelman, verb. [Jurata] Therefore not only matters of fact were tryed by 12. but of ancient time 12. Judges were

Of the number 12.

Joſh. 4. Geneſ. 49.

Plow. Com. in procemio. 12 Judges.

to try matters in Law, in the Exchequer Chamber, and there were 12. Counsellors of State, for matters of State; And he that wageth his Law, must have 11. others with him, which think he says true.

Less than 12 in Inquests of Office.

Finch 400. 484.

And the Law is so precise in this number of 12. that if the Tryal be by more or less, it is a Mis-tryal; But in Inquests of Office, as a Writ of Waste, there less than 12. may serve. F. N. B. 107. c. and in Writs to inquire of Damages, the just number of 12. is not requisite, for they may be over or under; And so it was resolved Trin. 1651. B. R. Abbot versus Holt, that the Sheriff ought (in Writs of Inquiry) to summon 12. by their names, yet Damages assessed by a less number is sufficient, and in the Writ to the Sheriff, quod ipse inquirat per Sacramentum pro bonorum hominum, omitting [duodecem] its good and usual.

Inquest of Office. Vide hic cap. 13.

And in a Writ of Inquiry of Waste by 13. it was holden Good. 1. Cro. 414.

In Dower if the Tenant come at the Grand Cape, and say he was always ready to render Dower, and issue is taken upon this, although seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Tryal of the issue, shall assess Damages. 22 E. 3. 15.

In

In what cases there shall be an Inquest of Office, and in what not, see Rolls tit. Tryal 595.

And although there can be no Verdict but by 12. yet by ancient course and usage, (which as my Lord Cook tells you, makes the Law in this Case, 1 Inst. 155.) the Sheriff is to return 24. And this is for expedition of Justice; for if 12. should only be returned, no man should have a full Jury appear or sworn, in respect of Challenges, without a Tales, which should be a great delay of Tryals; And for this cause at Common Law, 'twas Error if the Sheriff returned less than 24. But now it is remedied by the Satute of 18 Eliz. as a mis-return, see Cro. 1 part. 223. li. 5. 36, 37. By which Books it appears, that if the Sheriff return but 23. &c. it shall not vitiate the Verdict of 12. No, though a full Jury do not appear, so that the Tryal is by ten of the principal Pannel, and two of the Tales, notwithstanding Maynards Opinion to the contrary, and Cro. 3. part. 587. The Sheriffs used to summon above 24. scil. effrænatam multitudinem, but now they are prohibited by Statute, to summon above 24. Westm. 2. cap. 38.

Why the Sheriff returns 24.

If the Sheriff return less than 24 it is no Error.

Must not return above 24.

If the issue be to be tryed by 2 Counties, if but one of one County appear, although a

In what cases the Inquest shall remain for default of Jurors.

a full Inquest appear of the other, yet this shall remain for default, because they cannot try that which is in another County. There ought to be six of each County. And so of one Inquest out of a Franchise, and another out of the Guildable, and so of 2 Pannels returned in an Assise by several Baylifs of Franchises to try one issue, and one Pannel makes default, the issue shall not be tryed by the other Pannel, for the Jurors in one Franchise cannot make the view in another Franchise. Roll tit. Tryal 673.

2 Counties.

The manner of swearing the Jurors.

If the Jury be of 2 Counties, or 2 Pannels of the Guildable and Franchise, &c. they shall be sworn interchangeably first one of one, then another of the other.

If the Jury go at large until another day after they are sworn, and the Roll of the entry be not in Court, they may be sworn anew. Roll. tit. Trial 674.

Where there must be 16. and 24. in a Jury.

To make a Jury in a Writ of Right, which is called the Grand Assise, there must be 16. scil. four Knights, and 12. others; the Jury in an Attaint, called the Grand Jury, must be 24. Finch 412. & 485. But if the issue be upon a matter out of the point of the Attaint, as upon a Plea of non-tenure, the Tryal shall be by 12 Jurators. 21 E. 3. 1c.

There

There may be more than 16 in a Writ of right. Rolls tit. Tryal 674.

When Process used to be made out against the Witnesses in Carta nominat. to joyn with the Jury in Tryal of the Deed, as was used before the Statute of 12 E. 3. C. 2. ([his Testibus] being then part of the Deed) then the number was uncertain, according as the number of Witnesses were in the Deed: wherefore no Attaint lay, if the Deed were affirmed, because more than 12 joyned in the Verdict. But otherwise, if the Deed was not found, because Witnesses cannot prove a Negative. F. N. Br. 106. h. 1 Inst. 6. 2 Inst. 130. &c.

Where Witnesses joyn with the Jury, the number is uncertain.

Cannot prove a Negative.

If 12 are sworn, and one of them depart by consent, another of the Pannel may be sworn, and joyn with the other 11. in the Verdict. 11 H. 6. 13.

Juror departs and another sworn by consent.

In Error upon a Judgment in Cornwal, because the Tryal was but by 6. adjudged that it was erroneous, though it was returned secundum consuetudinem ibidem ante, &c. for such Customs are against Law, unless in Wales, which are permitted by Act of Parliament. Cro. 1. part. 259.

A Jury of 6.

If

Per primer Jurors. See hic *cap.* 4.

If the record be pleaded in Bar of the Aſſiſe, and the Party that pleads ſays, the ſame Tenements were put in view to the former Jurors: If the Plaintiff ſaith nient compriſe, This ſhall be tryed per primer Jurors, & auters. 13 H. 4. 10.

So if the Tenant ſaith that theſe Lands are not the ſame Lands before recovered, this ſhall be tryed per primer Jurors & auters. 22. Aſſiſe 16. and ſo in a Rediſſeiſin.

So in an Aſſiſe, if the Defendant plead a Recovery per view de Jurors in another Aſſiſe, this ſhall not be tryed by the Aſſiſe but per primer Jurors. 13 H. 4. 10.

And if at the return of the former Jurors and others, all the former Jurors appear, the Tryal ſhall be by them only, but if any do not appear, they ſhall be ſupplied by the others. 40. Aſſiſe 4.

In ſuch caſes where the Plaintiff is not to recover the Land, nor to defeate the former Judgement, if nient compriſe be pleaded upon a Recovery pleaded, this may be tryed by other than the former Jurors. 1 H. 6. 5.

As in Treſpaſs for Trees cut, the Defendant pleads that he recovered before in an

an Assise the same Land where, &c. and cut, &c. the Plaintiff says this Land, where, &c. was not put in view, and so nient comprise. This shall not be tryed by the first Jurors, but by others, because this action doth not defeat the former Judgement nor recover any thing but Damages. Note the difference. 1 H. 6. 5. Where the Tryal shall be per primer Jurors, and where by them and auters, and where only per auters, see Rolls tit. Tryal. 593.

Certificate of Assise what.

This is where the Bayliff of a Tenant in an Assise pleadeth, &c. and loseth by the Assise. and the Tenant himself hath a release, or some other discharge to plead, then he may by this means have the parties and first Jurors to appear again, and if it be found, he that before recovered shall lose the Land, and yield double Damages. Terms of Law.

CAP.

CAP. VII.

Who may be *Jurors*, who not; who exempted; and of their Quality, and Sufficiency.

Jurors must be *Liberi*.

SO much for their Number, next their Quality is to be considered; And for this, the Writ informs you who they ought to be, 1. Liberos, that is, Freemen, not Villains, or Aliens, and that not only Freemen, and not bond; but also those that have such freedom of mind, that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever, to either party; sometimes the word Probos, instead of Liberos, is attributed to them; they are both good Epithetes for a Juror, but I esteem the first most significant.

Forteſcue cap. 25.

Legales.

2. They ought to be Legales, not outlawed, not such as have lost Liberam legem, or become infamous, as Recreants, persons attainted of Felony, false Verdict, Conspiracy, Perjury, Præmunire, or Forgery upon the Statute of 5 Eliz. cap. 14. and not upon the Statute

Statute of 1 H. 5. 3. Not such as have had Judgement to lose their Ears, stand on the Pillory or Tumbrel, or have been Stigmatized or branded, nor Infidels, neither can any such be Witnesses. 1 Inst. 6.

3. Homines; they ought to be men, (yet there shall be a Jury of Women to try if a Women be Enseint, upon the Writ de ventre inspiciendo.) But what kind of men these ought to be, is worthy to be known. And for this, some men are exempted from serving in Juries, in respect of their Dignity, as Barons, and all above them in degree. Many are exempted by the Writ de non ponendis in Assisis, F. N. B. 166. as aged persons 70. years old, and many others are exempted, as Clerks, Tenants in ancient Demesne, Ministers of the Forest, (out of the Forest) Coroners, Infants under the age of 14. years, Officers of the Sheriff, sick decrepit men, and such as are exempted by the Kings Charter: yet in a Grand Assise, preambulation, Attaint, and in some other special Cases, such men as are not exempted by reason of their Dignity, shall be forced to serve, notwithstanding their exemption in other Cases. See Dalton's Office of Sheriffs, fol. 121. 52 H. 3. cap. 14. 2 Inst. 127. 130. 378. 447. and 561, Counsellors, Attorneys, Clerks, and other Ministers of the King Courts, are not to serve on Juries; But I find one Jury

A Jury of Women.

Exemption of Juries.

Who are to be exempted from Juries.

made of Attorneys of the Common Bench, and Exchequer, in a Case brought upon a Bill in the Exchequer, by Sir Thomas Seton, Justice, against Luce C. for calling of him Traytor in the presence of the Treasurer and Barons of the Exchequer. And this Jury of Attorneys gave the Justice one hundred marks Damages. 30 Assise 19.

A Jury of Attorneys.

The Court frequently order a Jury of Merchants, to try Merchants Affairs.

If the Charter of exemption be, that he shall not be put in Juratis Assisis seu recognitionibus, aliquibus yet this shall not excuse in a Writ of Right upon Tryal of the Grand Assise, for he comes, not in in this Case by such Proces as in other Cases, but is chosen by the Oath of the 4 Chivaliers, and now he is in a manner Judge in this Case. 39 E. 3. 15.

In what cases they shall be discharged by Charter.

Neither shall it exempt him in an Attaint, nor in a Grand Inquest, to inquire of Felonies, &c. because the Charter hath not this Clause, Licet tangat nos & hæredes nostros, 42. Ass. 5.

At the Nisi prius the Bayliffs of a Will. may shew a Charter, that to try contracts, &c. withyn the Will. the Inquest shall be all of Denizens without Foreigners, and this shall be allowed, and the Foreigners shall be ousted. 29. Assise 15.

At what time and how the Charter shall be allowed.

So

So may the Burgeſſes, who are put upon a Jury, out of the Borough, if they have ſuch a Charter. 30. Aſſiſe 1.

If a man be Impannelled of an Inqueſt and ſhew ſuch Charter of exemption of the ſame King in whoſe time he ſhews it, this ought to be allowed without Writ. 39 E. 3. 15. Rolls ib. 633. Allowed without Writ.

4. De vicinet. de C. It is not ſufficient that they dwell in the County, but they are to be of the Neighbourhood, Mayle plus procheins, to the place of the fact, as by Artic. ſuper cap. 9. it is appointed: They muſt be moſt near, moſt ſufficient, and leaſt ſuſpicious, ib. as I ſhall ſhew hereafter. Viſne.

5. Quorum quilibet habeat quatuor libras terræ, tenemen. vel reddit. per annum ad minus; This is their ſufficiency, where the debt or Damages (or both together, 1 Inſt. 272.) amount to 40 Marks or above. The ſufficiency of Jurors in other Caſes of leſſer moment, is ſtill left to the diſcretion of the Juſtices, Forteſcue cap. 25. who (experiente tells us) never require Jurors under 4 li. per annum, according to the Statute of 27 Eliz. cap. 6. before which, men of 40. s. per annum, ſerved; But neither this, nor the Stat. of 35 H. 8. extend to Juries in Cities, Towns Corporate, or Sufficiency of Jurors.

other

other priviledged places, or in the 12. Shires of Wales, so that there they shall be returned, as before they lawfully might have been; for the Jurors sufficency in Attaints, see the Statutes 15 H. 6. 5. 18 H. 6. 2. and 13 H. 8. 3.

As to the Statute 35 H. 8. 6. The tryal ordained by that Statute, lyes only in such actions, which have their ordinary tryal by 12. men, and not more, and by Writ of Nisi prius, and this only in those actions, in which the Proces of Venire facias, Habeas Corpora and Distringas, lyes against the Jurors, and in no other actions.

And although the Statute only mention the Tryal of issues joyned in the Kings Courts commonly holden at Westminst. and if the action be commenced in any other Court: yet if the Issue be joyned in any of the Courts at Westminster, it shall be tryed according to the said Statute, and so if those Courts are removed from Westminster, the issues joyned in them shall be tryed as the said Statute directs.

And the words betwixt party and party, shall only be intended of Common persons, and not betwixt the King and any other person, nor when the King joyns with any other person, in any action which by his release or pardon may be discharged before the action brought. Which

which is necessary to be known, in respect of Tales de circumstantibus, &c. See Williams his reading upon this Statute lately come out in print. In which are many ingenious speculations, but because they do not come often in practice, and the project of this Treatise, is only to contain matters useful for practicers; that the Book may not swell too big, I omitt them, referring you to the reading it self. See afterwards in the Chapter of Challenges.

It is the General course of the World, to esteem men according to their Estate; For Quantum quisque sua nummorum servat in arca, Tantum habet & fidei: And sure I am, the makers of this Law had cause enough to do so in this Case; for if men of less Estates should serve in Juries, such Fellows would only be shifted into Inquests as had more need to be relieved by the 8 d. than discretion to sift out the truth of the fact: 'Tis hard to get an unbyassed Jury now; But surely, less rewards would sooner bribe and byass meaner men, than these. Therefore less poverty or necessity should tempt, Every Juror must have 4 li. per annum, as aforesaid, of Free-hold, out of Ancient Demesne. And the Court may in matters of great consequence, direct a Venire facias, for a Jury of above 4 l. per annum, a piece, but not under. Cro. 2. part. 672. But

Jurors of above 4. l. p.r annum.

672. But in such Cases (every one knows) the Court most Commonly orders the Protonotary to chuse 48. out of the Sheriffs Book of Free-holders, of the most substantial men in the County, and the parties strike out 12 a piece, then the Sheriff returns the veil.

Jurors of 20. *per annum.*

Note in former times when Estates of inheritance were in few mens hands, such as had 40. s. per annum were found sufficient men to serve on Juries. After Estates of inheritance coming in greater measure to the Vulgar, it was by the said Statute 27 Eliz. cap. 6. made 4. l. per annum, and the same reason improving in late times, it was thought consisting with the wisdom of a Parliament to raise it to 20. l. per annum, to the end mens Estates might be trusted in the judgement of more knowing Judges of fact, when they become litigious, and this was by an Act of 16, 17 Car. 2. cap. 5. which being but a probationer, and to continue but for 3 years, and from thence to the end of the next Session of Parliament, it is expired, but for that it may be revived, as I humbly judge it expedient, I have thought fit to hint thus much concerning it.

Such a man who hath Land, Rent, Office or other profit Apprendre, out of ancient Demesn, to the clear yearly value of 4. li. of which he may have an Assise, he hath

suffi-

ſufficient Freehold, to be a Juror. Vide the ſaid reading. Where you may know what Eſtate is ſufficient to make a man a Juror. See hic in the Chapter of Challenges.

Et qui nec D. E. nec F. G. aliqua affinitate attingunt, the Law is very cautelous, in not leading men into temptation: Therefore leſt kindred and Affinity ſhould wrong the Conſcience to help a freind, our Jurors muſt not be related to any of the parties; And for this Reaſon likewiſe, the Statutes provide, that no man of Law ſhall ride Judge of Aſſiſe, or Gaol-delivery, in his own Country, 8 R. 2. 2. 33 H. 8. cap. 24. yet the contrary hereof is often done by a non obſtante; but how conſiſtent with integrity or prudence, they know beſt who procure it to be done. But becauſe moſt things concerning the Quality and ſufficiency of Jurors, will come more properly under the Title Challenge, I will refer you thither; And firſt, obſerve more particularly, De quo vicinet. the Jury ought to come. Jurors muſt not be of affinity to the parties.

CAP. VIII.

Concerning the *Viſne*, from what place the *Jury* ſhall come, &c.

Viſne. VIcinetum is derived of this word Vicinus, and ſignifieth Neighbourhood, or a place near at hand, or a Neighbour place, where the queſtion about the fact is moved. And the moſt general Rule (ſaith Coke, 1 Inſt. 125.) is, That every Tryal ſhall be, out of that Town, Pariſh, or Hamblet, or place known out of the Town, &c. within the Record, within which the matter of fact iſſuable is alledged, which is moſt certain and neareſt thereunto, the Inhabitants whereof may have the better and more certain knowledge of the fact.

And if a thing be alledged in D. the Venue muſt not be of D. but de vicineto de D. for otherwiſe the Neighbourhood would be excluded. Roll. tit. Tryal 622.

And if the fact be alledged in quadam platea vocat. Kingſtreet in parochia ſanctæ Margaretæ in Civitate Weſtm. in Com. Midd.

In

In this Case the Visne cannot come out of Place, because it is neither Town, Parish, Hamlet, nor place out of the Neighbour-hood, whereof a Jury may come by Law; but in this Case, it shall not come out of Westminst. but out of the Parish of St. Margaret, because that is the most certain. But therein also it is to be noted, that if it had been alledged in Kingstreet, in the Parish of St. Margaret, in the County of Middlesex, then should it have come out of Kingstreet; for then should Kingstreet have been esteemed in Law a Town: For whensoever a place is alledged generally in pleading (without some addition to declare the contrary, (as in this Case it is) it shall be taken for a Town. Parish. Town.

And albeit parochia generally alledged, is a place intertain, and may (as we see by experience) include divers Towns; yet if a matter be alledged in parochia, it shall be intended in Law, that it containeth no more Towns than one, unless the party do shew the contrary. But when a Parish is alledged within a City, there without question the Visne shall come out of the Parish, for that is more certain than the City. Parochia. More 559.

If a matter be pleaded done apud Bradford in Forfeild in parochia de Belbroughton, the Venue shall be of Belbroughton, and not of Bradford, for Belbroughton shall be intend-

ed to be a Town, and one Town shall not be intended to be in another Town, and therefore Bradford shall not be intended to be a Town. Rolls tit. Tryal 619.

The Venue shall ever be of the most certain place.

In a Quo warranto for using a Warren in D. if the Defendant say the Ville D. is parcel of the Manner of S. and prescribes to have a Warren within the said Manner and Demesnes thereof, the Venire facias shall be of the Manner, for the Manner by intendment, is more large than the Ville. If the Visne be de D. and S. and the Venire facias be de D. S. and V. this is not good, because it is too large. If apud Burgum de Plimouth, the Venue may be de Plimouth generally. If apud Villam de Cambridge in Warda Fori, and the Venire facias is de Villa & Warda prædict. this is helpt by the Statute of Jeofailes.

If the place be out of a Town, the Venue shall not be of the next Town, but from the place it self, but the Sheriff ought to return the Jury de pluis prochein vill.

In Ejectment of Land in Foresta de Kevennon in Com. the Venue may be de vicineto Forestæ, for this is a place known, and by intendment, because the Defendant hath not

not pleaded in abatement, This is out of any Parish or Hill.

In inferior Courts within Boroughs the Venire facias is Quod Venire facias 12. liberos Burgenses Burgi & parochiæ de B. although there may be 12 Burgesses which are not inhabitants, Rolls tit. Tryal 622. &c.

The Venue shall follow the issue. vide hic postea.

In Trespas and Battery in London, if the Defendant justifie in Mid. by Process out of the Marshalls Court, that he arrested him, and because the Plaintiff would not go with him, he beat him, &c. Absque hoc that he is guilty in London vel alibi, out of the Jurisdiction of the Court. To which the Plaintiff replies and acknowledges the arrest, but says that he beat him at London de injuria sua propria absque tali causa, and issue upon this, This shall be tryed in London, and the words absque tali causa are void, the issue being joyned upon a place certain, scil. London, affirmed in a Writ of Error. Rolls ib. 624. But the Court said, that he might have Demurred upon this Plea.

If a Trespas be alledged in D. and nul tiel ville is pleaded, the Jury shall come de Corpore Comitatus. But if it be alledged in S. & D. and nul tiel ville de D. is pleaded, De Corpore Comitatus.

ed, The Jury shall come out de vicineto de S. For that is the more certain. So if a matter be alledged within a Mannor, the Jury shall come de vicineto Manerii. But if the Mannor be alledged within a Town, it shall come out of the Town, because that is most certain, for the Mannor may extend into divers Towns. And all these points were resolved by all the Judges of England, upon Conference between them, in the Case of John Arundel Esq; indicted for the death of William Parker.

Mannor.

De Corpore Com.

Where there may be a special Visne, the Tryal shall never be de Corpore Comitatus. Leon. 1 part. 109.

If a Venire facias ought to be of one or more Vills in certain, in a County, and this is awarded de Corpore Comitatus, This seems to be aided by the Statute of 21 Jac. of Jeofailes, for this comes from the Vills out of which it ought to come, and from others, in as much as it comes de Copore Comitatus. Rolls tit. Tryal 618. and many other cases touching this matter.

But in Ejectment of Land called S. and no place is named where the Land lyes, and a Venire is awarded de Corpore Com. this is erroneous, and too large, because there is a place certain where the Land lyes, and yet it is not named in the Nar. as it ought to be. Hob. 121.

But

But if the iſſue be taken upon a title of dignity, as whether Chivaler or not, this may come de Corpore Comitatus, becauſe that the lieu lou, &c. is not material. ib:

If A. by the name of A. of the County of Hamſhire bring a Scire facias upon a Recognisance in Chancery in the Countie of Mid. againſt B. And the Defendant plead that the Plaintiff is Outlawed by the name of A. of the County of Cheſter, to which the Plaintiff replies, that he is not una & eadem perſona, this may be, by the body of the County of Mid. where the Writ is brought. ibidem.

In a quare impedit for the Church de Uſelbee, and the Defendant pleads that there is no ſuch Church, the Venue ſhall not come de Corpore Comitatus, but de vicineto de Uſelbee, for this is a place known, and it is intended the Church of Uſelbee is within the Ville of Uſelbee, Hob. 325.

In a prohibition, if the parties be at iſſue upon a cuſtom de non decimando of wood in the Wild of Suſſex, the Venire facias ſhall be de Corpore Com. for the Wild is not ſuch a place, whereof the Court may have conuſance to be ſufficient to have a Jury to come from this, for the Wild is a wood by intendment. Hob. 348. Wild.

In

Heir tryed where the Land lies, where not.

In a real Action where the Demandant demands Land in one County, as Heir to his Father, and alledges his Birth in another County, if it be denyed that he is Heir, it shall not be tryed where the Birth is alledged, but where the Land lyeth; For there the Law presumes it shall be best known who is Heir. But if the Defendant make himself Heir to a Woman, (for that is the surer, and more certain side, and the Mother is certain, when perhaps the Father is incertain) and therefore there it shall be tryed where the Birth is alledged, because they have more certain Conusance, than where the Land lyeth.

Cro. 3. part. 818. Cro. 2. part. 303.

Bastardy.

And so it is where Bastardy is alledged, the Tryal shall be in like Case, Mutatis mutandis.

Non concessit where the Land lies.

If the man plead the Kings Letters Patents, and the other party plead non concessit, it shall not be tryed where the Letters bear date, for they cannot be denyed, but where the Land lyeth.

Vicne.

Every Tryal must come out of the Neighbour-hood of a Castle, Manno, Town, or Hamlet, or place known out of a Castle, Manno, Town or Hamlet, as some Forests, and the like, as before,

Every

Every Plea concerning the person, Plaintiff, &c. shall be tryed where the Writ is brought. Where the Writ is brought at Common-Law.

When the matter alledged extendeth into a place at the Common Law, and a place within a Franchise, it shall be tryed at the Common-Law.

Matters done beyond Sea may be tryed in England, and therefore a Bond made beyond Sea, may be alledged to be made in any place in England, if it bear date in no place; But if there be a place, as at Burdeaux in France, then it shall be alledged to be made in quodam loco vocat. Burdeaux in France, in Islington in the County of Middlesex, and from thence shall come the Jury 1 Inst. 261. Lach. 4. and 5. So if the Tenant plead that the Demandant is an Alien born, under the Obedience of the French King, and out of the Legiance of the King of England; the Demandant may reply, that he was born at such a place in England, within the Kings Legiance, and hereupon a Jury of 12. men shall be charged; and if they have sufficient Evidence that he was born in France, or in any other place out of the Realm, then shall they find, that he was born out of the Kings Legiance. And if they have sufficient Evidence that he was born in England, Matters done beyond Sea, how tryable in *England*. *Vide cap.* 10. Alien.

or Ireland, or Guernsey, or Jersey, or elsewhere within the Kings Obedience, they shall find that he was born within the Kings Legiance. And this hath ever been the pleading, and manner of Tryal, in that Case. So of other things done beyond Sea, the adverse party may alledge them to be done at such a place in England, from whence the Jury shall come, and in a Special Verdict, they may find the things done beyond Sea. Ib. lib. 7. 26.

Things done beyond Sea.

Lib. 7. 26.

So when part of the act is done in England, and part out of the Realm, that part that is to be performed out of the Realm, if issue be taken thereupon, shall be tryed here by 12 men, and they shall come out of the place where the Writ or Action is brought. Ib. lib. 6. 48.

Part without the Realm, and part within.

Error, for that Judgment was given by default against the Defendant, being an Infant, issue was taken that he was of full age. And Godfrey moved, whether the Tryal should be in Norfolk, where the Land was, or in Middlesex, where the Action was brought. And the Court held, that it should be tryed in the County where the Land lay; and Tanfield said, It was so adjudged in the Kings Bench, between Throgmorton and Burfind. Cro. 3. part. 818.

Full age tryed where the Land lies.

Questions

Where the Land doth ly.

Questions of Title of Land (except by special order of the Judges in some cases) are to be tryed in the County where the Land lies, for the Law is, that all real and mixt actions, as Waft, Ejectment, &c. must be brought in the County where the Land is. But Debt, Detinue, Account, Actions of the Case, Battery, &c. are of their own nature Transitory, and yet they ought to be laid and tryed in their proper County, where the fact was done, unless the Court order the contrary, for some Special reasons; and if they are laid out of the proper County, dayly practice tells us the Court may alter the venue upon Affidavit, of the true place of the fact.

Transitory Actions.

Criminal matters.

All Criminal matters are to be tryed where the offence is committed.

This is called a Joynder of Counties. *Finch.* 410. Jury out of two Counties.

If the Venue arise in two Counties, the Jury upon 2. Venire facias shall come from both, 6 out of one County, and 6. from the other. Cro. 3. part. 646. but by consent of parties, entred upon Record, it may be by 5. out of one, and 7. from the other, as appears, Cro. 3. part. 471. where in Replevin, the Defendant avows for Damage fesant; The Plaintiff by his Replication, claims common by Prescription in loco quo, &c. being Broadway in the County of Worcester, appurtenant to his Manor

But out of more than two Counties it cannot be made.

of D. in the County of Glouceſter, and iſſue thereupon, and 2 Venire facias awarded to the Sheriffs of the ſeveral Counties, and now 7. of the County of Worceſter appeared, and 5. of Glouceſter. And although there ought to have been 6. ſworn of each County, to try that iſſue, as appears 49 Ed. 3. 1. 31 H. 8. 46. yet by the aſſent of parties, thoſe 12 who appeared, by advice of all the Juſtices, were ſworn, and tryed the iſſue. And it was commanded that this Aſſent ſhould be entred upon Record; for otherwiſe it would be a ſtrange Precedent.

In an Aſſiſe of Common in Confinio Comitatus, and the iſſue be, whether he had Common by preſcription in Land in one County, appendant to a Mannor in another County, this ſhall be tryed by both Counties.

The ſame Law is in Treſpaſs brought in one County (which cannot be in confinio) upon ſuch an iſſue, the Tryal ſhall be per ambideux Counties. 49 E. 3. 20. See Rolls tit. Tryal, 599. &c. many caſes where the Jury ſhall come from two Counties.

In an Action upon the Statute of Marlebridge, for taking a diſtreſs in one County and chaſing in another County, upon not guilty, the Tryal ſhall be only by the County where the chaſing is, for this is all the cauſe of the action. 4 H. 6. 4. In

In Eſcape upon an Arreſt in one County, and an Eſcape in another County, upon not guilty, this ſhall be tryed, where the Eſcape is laid, for the action is upon the Eſcape. Rolls ib. 602. Eſcape.

In an Action of Trover, apud Paxton in Com. Hunt. the Defendant pleads a Bargain and Sale, apud Royſton in Com. Hertford, in the Market there, whereby he after converted them, apud P. in Com. Hunt. The Plaintiff ſaith, that he was poſſeſſed of thoſe Goods, apud P. in Com. Hunt. and that J. S. there ſtole them from him, and by Covenant betwixt him and the Defendant, at P. in Com. H. he ſold them to the Defendant, as he hath pleaded: The iſſue was upon the Sale made by Covenant, &c. And it was tryed in the County of Hunt. and found for the Plaintiff. And it was moved to be a miſ-tryal; for it ought to have been by a Jury of the County of Hertford, or at leaſtwiſe by a Jury of both Counties; But it was adjudged to be well tryed becauſe the Sale is confeſſed, and the Iſſue is upon the Covenant alledged in Hertford, Cro. 3, part. 511. Covenant in P. to ſell at R. tryed at P.

In Debt upon a Bond in London, the Defendant pleaded an Uſurious Contract in the County of Warwick; the Plaintiff replyed, that the Bond was made upon good conſideration, Abſque hoc, that it was made for Uſurous Contract in another County.

for such Usurious Contract: the Tryal shall be in the County of Warwick; for the Bond is confessed, and the usury in Warwick is only in question; so if the issue be, whether the Deed were made by Dures, the Tryal shall be where the Dures, and not where the Deed, is supposed to be made. Cro. 3. part. 195.

A *Dures* shall be tryed there, not where the Action is brought.

Where issue is taken upon a surrender, it shall be tryed where it was alledged to be done, and not where the Mannor is, of which the Copy-hold is holden. ib. fo. 260. Br. tit. Visne 114.

Surender.

In an Assumpsit laid at London in Warda de Cheape, the Venire was De parochia de Arcubus in Warda de Cheape, whereas no Parish was mentioned before in the Count, & adjudged that the Venire was ill laid in the Count, for a Venire facias may be of a Town, Parish, Mannor, or other place known, but not of a Hundred or Ward, ib. and so it is adjudged, ib. Cro. 1 part. 165. for the Ward in a City, is but as the Hundred in a County. The Parish in London is in lieu of a Vill and the Ward of a Hundred. Roll. tit. Tryal 620, 621, 622. vide hic aptes.

Ward or Hundred, no good *Visne*.

Where the Visne is laid to be at a City, in an Action brought in a superior Court, or within the City, though it be both a City and County, the Venire facias may be

City.

be de vicinet. Civitatis, Lach. 258. Though it hath been held not good, but that the Venire facias must be de Civitate, leaving out Vicinet. as you may read in Stamf. 155. But now the Case in Cro. 2. part. 308. and Bulstr. 1 part. 129. say, that all Venire facias's are awarded de vicinet. Civitatis, which is intended as well de Civitate itself, as de vicinet. infra Jurisdictionem of the City. And so it is, de vicinet. Civitatis, or de vicinet. or de Civitate Coventry, Eborum, Norwich, Sarum, Bristow, Exon, and all other Cities which are Counties in themselves. In all places besides London, no mention is made of the Parish or Ward. Jb. 493. But in London the Parish and Ward is mentioned. And therefore it was adjudged, Cro. 2. part. 150. That it was not good to allege any thing done in London generally; But it must be, in what Parish from which a Venire may be; But where a thing is laid in a City, in alta Warda there, and the Venire facias is from the City only, it is well, because it shall be intended there be no more Wards in the same City. Cro. 3. part. 282.

Rolls 622. 623.

So in all inferior Courts. Stiles 2. March 125.

London.

City.

In an action against the Hundred upon the Statute of Winton, &c. upon the Roll the Venire facias is awarded of Bradley quod est proximum Hundredum, and the Venire facias is generally of Bradley. This is well, because by the Roll it appears that Bradley and the Hundred were all one. Roll. tit. Tryal 598.

Hundred.

If a thing be laid done, apud Briſtol, viz. in Wardæ Sanctæ Mariæ in Warda de Ratliff, and the Venire facias is de Warda de Ratliff, this is not good. ib. 619.

But if it be alledged in a Ward in the City of Briſtol, &c. the Venue ſhall be of the Ward, not de Civitate.

Ward. A Venire facias was awarded from T. and not de vicinet. de T. and for this cauſe reſolved to be ill, and not amendable. Cro. 2. part. 399. Bro. tit. Ven. fa. 8.

De vicinet. left out, ill. If the iſſue be, Si rex conceſſit per literas patentes, The Tryal ſhall be, as hath been ſaid, where the Land lies, and not where the Patent was made, becauſe the Patent is of Record; and if it be traverſed, it ſhall be tryed by the Record, and therefore the iſſue being upon non conceſſit, the iſſue is not upon the Patent; but where the iſſue is upon non conceſſit, or non dimiſit, of a thing which paſſeth by Deed, the Tryal ſhall be where the Grant or Demiſe is alledged: But of a Feoffment, or Leaſe for life pleaded, the iſſue being non Feoffavit, or non dimiſit, Livery ought to be made, and therefore the Tryal ſhall be where the Land lies. Cro. 2. part. 376. 3. part. 259.

Where the Land lies.

to

Where the offence is laid in the Count to be in one County, and the Juſtification in another County, and the Plaintiff replies, de injuria ſua propria, &c. The Viſne ſhall be where the Juſtification is alledged; As, one Example for all, to illuſtrate. In an Action upon the Caſe, for words ſuppoſed to be ſpoken at Bridg-North, in the County of Salop, the Defendant pleads, that he ſpake them as a Witneſs upon his Oath, upon an iſſue tryed at Chard, in the County of Somerſet. The Plaintiff replies de ſon tort demeſne, &c, And thereupon it was tryed by a Venire facias of Bridg-North, And Error thereof aſſigned, becauſe it ought to have been by a Viſne of Chard, where the Juſtification aroſe, and it was held clearly to be a miſ-tryal; and not aided by the Stat. of Jeofailes, wherefore the Judgment was reverſed. Cro. 3. part. 468. 261. 870. More 410.

Where the Action is laid in one County, and the Juſtification in another, the Tryal ſhall be where the Juſtification is.

Replevin, taking 2 Horſes at ſuch a place in Denford in Com. Northampton, the Defendant makes Conſans as Bayliff to the Lord Mountague of his Mannor of S. which Mannor is holden of the Honour of Glouceſter, and that the place in which, &c. is within the ſaid Honour, and alledges a Cuſtome within the ſaid Honour, on which Cuſtome the parties were at iſſue, and the Venire facias was from Denford the place of taking,

which was moved after Verdict, for that the Venue was not so large as the issue, which was the Honour, and of this opinion was the whole Court of C. B. Pasch. 13 Car. 2. Hull vers. Banning.

But the great question was, whence the Venue should arise in this Case, and per Bridgman Ch. Just. and Just. Hide, in no Case can a Venue arise from an Honour; and Ch. Just. said, he had caused the Prothonotaries to search for Precedents, and they could not find that ever a Venue did arise from an Honour, which is but a bundle of services, and an incorporeal thing, from which no Venue can come, and yet an Honour may have demesns, as the Honours of Grafton and Hampton have, but Glouceſter not.

Honours.

Ch. Just. and Just. Hide, seemed that the Venue should be de Corpore Comitat. Hob. 266. 249. But when the Court was after moved for their opinion, they had them take a Venire facias at their peril, and would give no opinion.

An action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff, a walk called Shrob-walk in the Forest of —— in Com. Northampton, and Covenanted for peaceable injoyment, &c. and

and he was ouſted per Earl of Northampton who had right, on which Right iſſue was joyned, and the Venire facias was from Shrob-walk.

Per Cur. It's not good, for it appears by the Record that Shrob-walk is not a Vill: but if the Obligation had been laid to be made at Shrob-walk, the Venue ſhould ariſe from thence as a Vill. Inter. Stirt & Bales Paſch. 19 Car. 2. B. R.

The Venue ſhall follow and be according to the iſſue. Out of what County.

As for words in Warwick-ſhire Thou art a Thief and ſtoleſt my Iron: The Defendant juſtifies & ſays, the Plaintiff ſtole the Iron in Leiceſter-ſhire, and brought it into Warwick-ſhire, and therefore he ſpake the words in Warwic-ſhire. If the Plaintiff replies de injuria ſua propria abſque tali cauſa, the Jury ſhall come from Leiceſterſhire, to which the abſque tali cauſa refers, for the words are acknowledged. See Rolls tit. Tryal 598. 623. *Vide hic ante & poſtea.*

When part of the matter to be inquired of, is in one County or place, and part in another, the Tryal ſhall be there where the beſt Conuſans of the matter may be.

As in an action upon the Caſe, the Plaintiff declares that the Defendant took the From the place beſt

Horſe of A. at S. and ſold him at D. to the Plaintiff as his proper Horſe, and afterwards A. retook the Horſe. If the Defendant plead that the property was in him at the ſale, upon which iſſue is joyned; The Venue ſhall be de S. where the taking is ſuppoſed, for there the property may be beſt known; which is only in queſtion. 42. Aſſ. 8. ſee ſeveral caſes in Rolls ib. 603. under this head.

Where the Counties cannot joyn.

If the iſſue be whether L. did ride from London to York, and from York to London 5 times in ſix days, this may be tryed by London only. Although part of the matter to be inquired of was done in each County.

In an action of Battery in London, if the Defendant juſtifies in defence of his poſſeſſion in D. in Eſſex, and the Plaintiff ſays de ſon tort demeſn ſans tiel cauſe, this ought to be tryed by both Counties if they might joyn, becauſe he may be found guilty at another day, and therefore becauſe they may not joyn, this may be tryed in Eſſex.

Of Aſſiſes in confinio Com. See. 1 Inſt. 154.

In caſe for words in one County, if the Defendant juſtifie in another County, and the Plaintiff reply de ſon tort demeſn, &c. although the Counties ought to joyn, if they could, and the Juſtification is principally put in iſſue, yet the Tryal may be in either County at the Election of the Plaintiff.

In

In Ejectment in London upon a Lease made there of Land in Mid. if the Defendant plead not guilty, this may be tryed in London, because the Counties cannot joyn, although the Jury ought to enquire of the Ejectment in Mid. and judgement affirmed in a Writ of Error. See Rolls tit. Tryal 602. Rolls tit. Tryal 620.

London cannot joyn with another County. 49 E. 3. 20.

Two Counties may joyn although they be not nearest, nay though 20 Counties be between them. Finch French. 59. 1 Inst. 154.

But if it be of a Lease at Ickford of Land in Bury in Suff. the Venue must be of Bury not of Ickford. ib. 619.

If the issue be taken upon the name or condition of the person, this shall be tryed in the County where the Writ is brought, 21 E. 4. 8. for this may be well known there. Rolls ib. 615. Where the Writ is brought.

Where the issue is to be tryed upon a point which shall be tryed by two Counties, and one cannot joyn with the other, this shall be tryed, where the Writ is brought. 21 E. 4. 8. but for this see before where the Counties cannot joyn.

In Debt in London against I. S. of D. in Essex, if the Defendant saith that he was at S. in Essex at the time of purchasing the Writ, Where in other County than where the writ is brought.

Writ, and not at D. this shall be tryed in Essex, and not where the Writ is brought, for none can know where he dwelt so well as the County of Essex. 12 H. 6. 5.

Vide many cases in Rolls ib. 625. &c. about this matter.

Where the escape was, and not where the Arrest was.

In an Action of the Case against a Sheriff, upon an escape in London, and the Arrest laid to be in Southampton; adjudged, that the Visne shall be where the escape was, because that is the ground of the Action, and not where the Arrest was. Cro. 3. part. 271.

In Debt upon an Obligation, payment was pleaded, apud domum mansionalem Rectoriæ de Much-Hadam, and the Venire facias was de vicineto de Much-Hadham, where it ought to have been de vicinet. Rectoriæ de Much-Hadam; but it was adjudged good, because Much-hadam is here intended a Vill. ib. 804. So you see, that where a thing is alledged to be done at the Capital House* of D. there the Venire shall be of D. For that is intended to be all one with the Vill. But where it is at the Castle of Hertford, &c. there the Venire facias shall not be de vicineto de Hertford; but de Castro de Hertford, for Castrum Hertford is intended a distinct place by it self; and so of all Castles. Cro. 2. part. 239. More 862.

* Rectoriæ.

Castle.

Rolls tit. Tryal 621.

A

A Venire facias may be awarded of a Caſtle. Rolls 618.

Where the iſſue is not parcel of the Mannor of D. or the Cuſtom of a Mannor is in queſtion, the Venire ought to be of the Mannor. Hob. 284. Cro. 2. part 327. If the Mannor be laid to be in a Vill, the Venire facias may be of the Mannor in the Vill, as de vicineto manerii de Stanſted-Hall in Windham. Cro. 2. part. 405 More 851. Arundels Caſe. li. 6. 14. Mannor. Rolls tit. Tryal 621.

The Venue cannot be of a ſcite of a Mannor. Rolls tit. Tryal 618.

In the Common Bench, in Treſpaſs, for taking away a Bag of Pepper, the Defendant juſtified as Servant of the Mayor and Commonalty of London, for Wharfage due to them, by the Cuſtome of London, which the Plaintiff refuſed to pay. The Plaintiff replyed, that the Cuſtome did not extend to him, becauſe he was a Free-man of the City, and ought not to pay Wharfage, to which the Defendant re-joyned, that the Cuſtom extended to him, as well as to ſtrangers; upon which, iſſue was joyned. London.

Reſolved, 1. That the iſſue ſhould be tryed per Pais, not by the mouth of the Recorder, becauſe he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the cauſe. Recorder.

2. That

2. That the Venire facias ſhould not be awarded to the Sheriffs of London, nor Middleſex, becauſe the Tryals there, are by Free-men. But it ſhall be to the County next adjoyning, viz. to the Sheriff of Surry. So where any City is concerned, the Venire facias ſhall not be directed to the Officers of the City, but to the County next adjoyning. Hob. 85. Stiles 137. More 871. vide hic cap. 2.

Where the Tryal ſhall be by the County next adjoyning.

If the iſſue concern the Mayor and Commonalty of a Town, the Array ſhall be made all of Forreigners. 31. Aſſiſe 19. vide Rolls tit. Tryal 597.

So if the iſſue concern the Mayor and Commonalty, &c. although they are not parties, yet the Venire facias ſhall be directed to the Sheriff of the next County. 15 E. 4. 18.

Where a man lends his horſe in one place, and he is ſpoiled in another, *Vide* where he is ſpoiled.

Where a man lends a Horſe to another to till his Land, and the Horſe dies with exceſſive Labour, the Viſne ſhall be from the place where the exceſſive labour was, and not where the delibery was. More 887. vide Hob. 188. Rolls tit. Tryal 615. paſch. 22 Car. 2. B. R. Horſley verſus Potter. An action of the caſe was brought for miſuſing an Horſe, in Itinere; the Contract was laid at Swafham in Norf. and the riding to Peterborough

tough in Northampton-ſhire, where the Horſe died, it was tryed in Norf. and the Court ſeemed that it ought to have been tryed in Northampton-ſhire, where the damage was done; and not where the contract was made, but it was aided by the Stat. of Jeofailes. 17 Car. 2. cap. 17. (after Verdict) that Statute being then in force.

Where a promiſe is laid in one place, and the breach in another, the Viſne muſt be according to the event of the iſſue, whether it be taken upon the promiſe, or breach. But if no place be alledged for the breach, and iſſue be taken upon it, the Viſne muſt be from the place of the promiſe, which ſhall be intended right, where the contrary appears not, ſee Godbolt 274. Promiſe in one place and breach in another. *Viſne* guided by the iſſue.

Eaſter 39 Eliz. In the Kings Bench, Treſpaſs, Aſſault and Battery, en Wilts, continuing the Aſſault in Middleſex, and adjudged that the Jurors ſhall come out of both Counties. More 538.

The name of a Manor, or Land, or other local thing, ſhall be tryed where it lies, becauſe it is local; but the name or addition of a perſon, ſhall be tryed where the Action is brought, becauſe this is tranſitory. Brooke, Viſne 7. lib. 6. 65. Miſnomer.

Where the Land lies.

In Covenant upon an Indenture of Demiſe of the Rectory of Stoken Church, in the County of Oxford, That the Defendant had good Power and Authority to demiſe: The Indenture was alledged to be made at London, and the Venire facias was awarded to the Sheriff of Oxon, and this being aſſigned for Error, Judgement was affirmed, and this adjudged to be good. More 710. becauſe the Rectory was in Com. Oxon. vide pag. 45.

Where the Land lies and not where the Writ, &c.

In Debt upon an Obligation in one County to perform Covenants in a Leaſe, and the Land and payments were in another County; The Tryal ſhall be where the Land and payments are. 44. E. 3. 42.

In Debt upon a Leaſe in one County, and the payment of the Rent upon the Leaſe limited there alſo, but the Land was in another County, and the payment upon the Land; this ſhall be tryed where the Land and payment was, for he was bound to pay this there upon the diſtreſs. ib.

But the Tryal ſhould have been where the Writ was brought, if the payment had not been alledged to be where the Land was. ib.

Where the Land and Writ, &c.

If Debt be brought for Rent upon a Leaſe for years, and the Action is brought, where the Land is, but the Deed of the Leaſe bears Date

Date in another County, the Tryal shall be where the Land and Writ is brought, 43 E. 3. 8. The issue being whether the Lessor had a conditional estate or not, & so a lawful eviction.

If the issue be in an Assise whether the Tenant be the eldest Son of J. S. and his birth is alledged in another County, yet this shall be tryed where the Land is. 46. Ass. 5. Where the Land lies and where not.

If an infant bring an Assise, and a release of his Ancestor is pleaded against him dated in another County, this must be tryed where the Release is dated, and not by the Assise, although the Plaintiff be an Infant, and the circumstances are to be inquired. 21 E. 3. 20. See Rolls ib. 611.

In case if the Plaintiff declare upon a trust at D. and of a wrong at S. upon not guilty, if it appear the trust is not material, the Venue shall only come from S. and not from both places, one not being material. Where from two places in one County, and where not. *Vide hic.* cap. 10.

In case for stopping a way from such a place, to such a place, and that the obstruction was at D. upon not guilty the Venue shall not come from D. only, for all the way is put in issue.

In Trespass in one Vill, and a release pleaded dated in another Vill, within the same

same County, upon non est factum, this shall be tryed per ambideux. Rolls ib. 624. vide hic ante. See Rolls ib. 615. many cases about this.

De Corpore Com. Where the Venue cannot be from a Vill, Hamlet or lieu conus, there it may be de Corpore Comitatus, for if it might not be so, the cause could not be tryed.

A lieu conus is a Castle, Manno or other notorious place well known, and generally taken notice of by those who dwell about it, and not a Close or Pasture of ground, or such like place of no repute.

A Custom of a County is to be tryed de Corpore Comitatus, for the Custom runs thorough the whole County.

Parish. Where the Parish is named by way of denotation, or explanation of the place where the Fact is alledged to be done, as at the Parish-Church of Hauk Huck-nol, there the Venire facias shall be of the Town, not of the Parish. Bulstr. 1 part. 60, 61.

Town. If the Fact be alledged in Kingstreet, in the Parish of St. Margarets, in Com. Mid. you have already heard that the Visne shall be from Kingstreet, because it is intended to be a Town; but where it is alledged to be done at Grays-Inn-Hall, or Lincolns-Inn-Hall,

Hall, &c. in Holborn, the Viſne ſhall be from Holborn, which is the Town; for as Yelverton ſaid, it was never heard of any Venire facias to be had of any of the Inns of Court, Bulſtr. 2. part. 120. eſpecially of the Hall, becauſe it cannot be of a Houſe, much leſs of a Hall. Inns of Court. Not from houſe or hall.

In Ejectment upon a Demiſe made at Denham of Lands in parochia de Denham prædict. The Viſne may be of Denham, or of the Pariſh of Denham, becauſe Denham and Parochia de Denham prædict. are all one by intendment of Law. Bulſtr. 2. part. 209. More 709. Hob. 6. But when it appears by the Record, or is intended that the Pariſh is more ſpacious than the Town, as the caſe in More 837. where in Ejectment the Leaſe was alledged to be made at Bredon, of Tythes in W. and W. Hamlets within the Pariſh of Bredon, there the Venire facias muſt not be of Bredon, but of the Pariſh, becauſe it appears, that the Pariſh extends further than the Town. Hob. 326. Pariſh.

Where an Action of Debt for Rent, is brought upon the privity of the Contract, by the Leſſor, as againſt the Leſſee, or his Executors, for Arrearages due in the life-time of the Teſtator, the Viſne may be laid in any place; but where the Action is brought upon the privity in Eſtate, as againſt the Aſſignee of the Leſſee, or his Executors, for Rent For Rent where the Land lies, and when not.

Rent due after the Teſtators death, the Viſne muſt be, where the Lands lie. Lach. miſ. printed, 197. 262. 271. v. li. 3. 24.

And ſo it was adj. in caſe of Hall and Arnold, Mich. 1656. B. R. and it was further adj. there, the Caſe being of a Leaſe made at London of Lands in Monmouthſhire, rendring Rent payable at the Old Exchange, for which action is brought by the Heir. If there had been no place of payment, the Heir muſt have brought his Action where the Lands lie, but the place of payment being in another County, he hath his Election, as on a Leaſe for years of Lands in two Counties.

Debt for rent of Land in another County.

Walkers Caſe, in Debt upon a Leaſe of Land in another County, Nihil debet ſhall be tryed where the action is brought. Br. tit. Viſne 119. Vide pag. 93.

In Replevin brought by Strede, againſt Hartly, for taking a Diſtreſs at Baildon, the Defendant made Conuſance as Bayliff, becauſe that locus in quo, &c. was holden of W. H. as of his Mannor of Baildon, and upon iſſue, hors de ſon fee, the Venire facias was de vicineto de Baildon; and upon motion that the Venire facias ought to have been, as well from the Mannor, as the Town, The Court adjudged it to be well trough, for that the Court ſhall not intend

Mannor.

the

the Manor was larger than the Town, because it doth not appear so to be, though possibly it might, as like the Case of Town and Parish. Hob. 305. 326.

If the Sheriff return that there are no Freeholders of that Visne, or if the Visne be where the Kings Writ runs not, as in the Cinque Ports, &c. or in a place where the men are priviledged from serving on Juries out of that place, as the Isle of Ely, &c. the Plaintiff may pray a Venire facias of the Visne next adjoyning, and if the Visne be in Wales (or brieve le Royne Court) the Venire facias shall be directed to the Sheriff of the next English County, to cause the Jury to come de propinquiori Visne of his County, to the Visne in Wales adjoyning: For the Court shall not be vexed of the Plea. Fitz. Abridg. tit. Visne & Jurisdict. 24. Visne next adjoyning in what Cases. Cinque Ports. Wales.

In an action against a Hundred, the Venire facias may come from the next Hundred generally.

In Trespass, if the Defendant plead not guilty to part, and to the residue a Plea, which causes the Tryal of that to be by a Jury de Prochein Hundred, The Venire shall be awarded al Prochein Hundred, for both issues, because there ought not to be two Venire facias in one action. vide Rolle tit. Tryal 596.

In

In an Appeal of murder committed in the Cinque Ports, although the King be concerned, yet because this is betwixt common persons, the Venire facias to the next adjoyning Vill ibidem.

Ireland. If the issue be joyned of a matter in Ireland, this shall be tryed by a Jury of the next County in England. ib.

Prochein Hundred. If the issue be to be tryed by the Venue of a Mannor, and the Plaintiff suggests that he is Lord of the Hundred in which the Mannor is, and that all within the Hundred are within his Distress, if the Defendant acknowledge this, the Venue shall not be de Corpore Comitatus, but of the next Hundred, for if it should be de Corpore Comitatus, this should be tryed by the Tenants of the Mannor. Rolls ib. 667.

Visne misawarded in part. If the Visne is in some part misawarded, or sued out of more places or fewer than it ought to be, so as some place be right named, this is aided by the Stat. of Jeofailes, which hath ended the differences, in many cases reported in our Books, concerning this point, wherefore I purposely omit them.

Infamy where the Land lies. Error, for that the Judgment was given by default against the Defendant, being an Infant, upon issue that he was of full age, adjudg-

adjudged, that the Tryal should be in Norfolk, where the Land was, and not in Middlesex, where the Action was brought. Cro. 3. part. 818.

If the Visne cometh from a wrong place, yet if it be per assensum partium, and so entred of Record, it shall stand; for Omnis Consensus tollit errorem. 1 Inst. 125.

May be out of a wrong place by Consent.

Holmes vers. Sanders Hill. 22, 23 Car. B. R. Error to reverse a Judgement given in the Kings Bench in Ireland, in Debt for Rent brought by the Assignes of a reversion, the Plaintiff declared of a Lease of Land in such a Parish in the Suburbs of Dublin, on nil debet pleaded, the Venire facias was from the said Parish in Civitate Dublin, and Judgement there per Plaintiff, it was assign'd for Error, because the Land lies in the Suburbs of the City, and the Venire facias was from a Parish in the City.

Per Cur. It is all one, for the Suburbs are always within the Franchise of the City, as Fleetstreet is within the Suburbs of London; but the Strand not, though so reputed.

Note, It was adjudged Error in an Inferior Court, that the Venire facias was awarded secundum consuetudinem Curiæ which ought to be per Curiam. Reader vers. More, Mich. 1650. B. R.

CAP. IX.

Challenges.

YOu have already seen of what Vise the Jury ought to be: The next thing to be considered, is concerning Challenges.

Challenge. Challenge is a word common as well to the English as to the French, and sometimes signifieth to claim, and the Latine word is vendicare; sometime in respect of revenge to challenge into the field, and then it is called in Latine, vindicare or provocare; Sometime in respect of partiality or insufficiency, to challenge in Court persons returned on a Jury. And seeing there is no proper Latine word to signifie this particular kind of challenge, they have framed a word anciently written Chalumniare, and Columpniare, and Calumpniare, and now written Calumniare, and hath no affinity with the verb Calumnior, or Calumnia, which is derived of that, for that is of a quite other sense, signifying a false accuser, and in Calumniator. that sense, Bracton useth Calumniator to be

be a falſe accuſer: but is derived of the old word Caloir, or Chaloir, which in one ſignification is to care for, or foreſee. And for that to challenge Jurors, is the mean to care for or foreſee, that an indifferent Tryal be had, it is called Calumniare, to challenge that is, to except againſt them that are returned to be Jurors, and this is his proper ſignification: But ſometimes a Summons, Sommonitio is ſaid to be Calumniata, and a Count to be challenged, but this is improperly. And forasmuch as mens Lives, Fames, Lands, and Goods, are to be tryed by Jurors, it is moſt neceſſary that they be Omni exceptione majores, and therefore I will handle this matter the more largely.

A Challenge to Jurors is twofold, either to the Array, or to the Polls: to the Array of the principal Pannel, and to the Array of the Tales. And herein you ſhall underſtand, that the Jurors names are ranked in the Pannel one under another, which order or ranking the Jury, is called the Array, and the Verb, to Array the Jury, and ſo we ſay in common ſpeech, Battail Array, for the order of the Battail. And this Array we call Arraiamentum, and to make the Array, Arraiare, derived of the French word Arroier; ſo as to challenge the Array of the Pannel, is at once to challenge or except againſt all the perſons ſo Arrayed or Impannelled, in reſpect of the

Challenge is twofold.

To the Array.

Array.

Partiality or default of the Sheriff, Coro-ner, or other Officer that made the Return.

Principal Challenges.

¶ And it is to be known, that there is a principal cause of challenge to the Array & a challenge to the favour: principal, in respect of partiality, as first, if the Sheriff or other Officers be of kindred or affinity to the Plaintiff or Defendant, if the affinity continue. Secondly, If any one or more of the Jury be returned at the denomination of the party, Plaintiff or Defendant, the whole Array shall be quashed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other, all the Array shall be quashed. Thirdly, if the Plaintiff or Defendant have an Action of Battery against the Sheriff, or the Sheriff against either party, this is a good cause of challenge. So if the Plaintiff or Defendant have an action of Debt against the Sheriff, (but otherwise it is, if the Sheriff have an action of Debt against either party) or if the Sheriff have parcel of the Land depending upon the same Title, or if the Sheriff or his Bayliff which returned the Jury, be under the distress of either party; or if the Sheriff or his Bayliff be either of Counsel, Attorney, Officer in fee, or of Robes, or servant of either party, Gossip, or Arbitrator in the same matter, and treated thereof. And where a subject may challenge the Array for unindifferency, there the King, being

ing a party, may also challenge for the same cause, as for Kindred, or that he hath part of the Land, or the like; and where the Array shall be challenged against the King, you shall read in our Books.

In Ejectment, the Plaintiff suggesteth that his Lessor, the Sheriff and Coroners were Tenants to a Dean and Chapter, whose Interest was concerned, and prayed the Venire facias to Elisors, and had it, being confessed by the Defendant, and the Court took it a principal challenge. v. Hut. 24. More 470. Roll. rep. 328. Duncomb and Ingleby, Trin. 15 Car. 2. B. R.

A prayer to Elisors in Tryals at Bar may be at the suit of the Defendant or Plaintiff, but in Nisi prius at the prayer of the Plaintiff only, and per Cur. it is a principal challenge that the Plaintiffs Lessor is Sheriff or kindred, and if the Plaintiff doth not pray, &c. the Defendant may challenge the Array at the Assises. Lord Brookes Case, Trin. 1657. B. R.

'Tis a good challenge to the Array, that the Array is made and returned by 2 Coroners, only when there are four in the County, and that the Writ is returned by one of the Sheriffs of London only. So if a Bayliff return them that are out of his Franchise, or if an Array be to be of persons out of a Fran-

Franchise & Guildable, and the Bayliff return them, for the Sheriff ought to make it; and that some of the Pannel were returned by the Bayliff of a Franchise, where the whole Pannel is returned as Array by the Sheriff, this is a good challenge to the Array, for otherwise the parties would lose their challenge to the Array made by the Bayliff. Rolle tit. Tryal 636.

By what person.

If the Defendant sue the Writ of Hab. Corpus by Proviso at the return, the Plaintiff may challenge the Array for Kindred between the Defendant and the Sheriff. D. 15 El. 319. 13.

What Consanguinity is sufficient.

D. 15 El. 319. The Array was quashed although the Sheriff was the Nause in descent, and the Tenant in the 7. descent from the Ancestor of whom both descended, Cousin to the parties Wife, although herself no party. So if the Wife be dead, if she be alive. These are good challenges to the Array.

For affinity.

Alliance to one party is a good challenge.

At what time.

If the Sheriff be allied at the making of the Pannel, and be dead at the challenge, yet this is a good challenge. 'Tis no challenge that the Sheriff became of kin after making the Pannel.

'Tis

'Tis no challenge to the Array if all the Jurors be of affinity.

It may be after a Tales prayed, for no challenge can be until the Jury is full. If the ſuggeſtion of Couſinage to have the Venire facias to the Coroners be denyed, and the Venire facias is awarded to the Sheriff, the ſame challenge ſhall not be allowed to the Array, but any other cauſe may be alledged, than what was before denyed.

Favourably made by the Sheriff or his Bayliff or the Bayliff of a Franchiſe, is a good challenge. That the Sheriff is within the Diſtreſs of a party, or ſervant to the Plaintiff, Of the Robes of the Plaintiff, was Arbitrator for a party, is procurator and maintainer of a party, That the Sheriff purchaſed part of the Land in queſtion, That the Pannel was made by the Bayliff of the Franchiſe of the other party. Theſe are good challenges to the Array. For favour.

'Tis no principal challenge that one party is Tenant, or ſervant to the Sheriff, but it is a good challenge for favour.

It is a good challenge to the Array, That the Sheriff made the Array, or put a Juror into the Pannel at the denomination of any of the parties in favour to them, or of their Denomination.

their ſervants, or of one intereſſed, or of a maintainer, or of the Counſel, or of a procurator.

Not if ſtrangers by the Sheriffs leave make the Pannel, or it be made at the requeſt of both parties.

For malice. 'Tis a good challenge to the Array, that one of the parties has brought an action of Debt againſt the Officer that returns the Pannel, or that there is a difference betwixt the Officer and the party, that the Officer killed his ſervant.

But not that the Officer has Debt againſt the party, for he may demand his Debt without malice.

How and in what manner the Challenge is to be made. The Challenge ought to be quod tempore Pannelli prædict Arraiati, the Sheriff was Couſin to the Wife of the Defendant, &c. not afterwards, nor before, unleſs you aver that ſhe was alive or had iſſue at the making the Pannel.

If the Challenge be taken for Conſinage, it ought to be ſhewn coment Couſin, but in ſuch a challenge to be a Juror 'tis not neceſſary to ſhew coment Couſin.

What Counterplea of a Challenge is good and how to be pleaded. The manner and conveiance of the Conſinage alledged in a challenge is not traverſable,

berſable. You may traverſe the Couſinage prout without modo & forma. If the Challenge be that the Sheriff was Couſin to the Plaintiff, or within his diſtreſs; 'tis no Counterplea to ſay he is likewiſe of kin to the Defendant, or within his diſtreſs alſo.

Where the King is party to the iſſue, no challenge ſhall be to the array for favour, 38 Aſſ. 19. Where the King is party.

Otherwiſe if the Sheriff be Vadelect of the Kings Crown, or ſuch menial ſervant.

If it be preſented that I. S. hath made a nuſance to London and le gents, 'tis no challenge to the array, to ſay the Sheriff of Middleſex is deputed and removable by the Commonalty of London, becauſe this is the ſuit of the King.

The King may make his challenge that the Sheriff is within the parties diſtreſs, although every ſubject owes greater favour and obedience to the King, by reaſon of his Allegiance, than to any Lord by reaſon of Tenure.

In a writ of Right or any other writ, a Baron of the Realm may excuſe himſelf. What perſons may be impannelled.

In a writ of Right the Inquest ought to be all Knights. A Banneret | may be impannelled in this writ; so may a Serjeant, if there be not Chivalers covenable.

In an attaint upon a recovery by false verdict in an Assise, some Knights ought to be returned, and if there be not any in the Hundred where the Land lies, they shall be returned out of the County.

By default of the Sheriff, as when the array of a Pannel is returned by a Baylif of a Franchise, and the Sheriff return it as of himself, this shall be quashed, because the party shall lose his challenges. But if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

Where there must be a Knight returned of the Jury.

If a Peer of the Realm, or Lord of Parliament be demandant or Plaintiff, Tenant or Defendant, there must a Knight be returned of his Jury, be he Lord Spiritual, or Temporal, or else the array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be no Knight returned, the array shall be quashed against

against all. So in an attaint, there ought to be a Knight returned to the Jury.

If two Peers sue as Gentlemen, and admit themselves so in pleading; 'tis no challenge to say, no Knight is returned; for the Sheriff is in no fault.

And when the King is party, as in traverse of an Office, he that traverseth may challenge the array, as hereafter in this Section shall appear; and so it is in case of life: And likewise the King may challenge the array, and this shall be tryed by Tryors according to the usual course. The array challenged on both sides shall be quashed. Where the King is party.

And if two estrangers make a Pannel, and not in favourable manner for the one party or the other, and the Sheriff returns the same, the array was challenged for this cause, and adjudged good.

If the Bayliff of a Liberty return any out of his Franchise, the array shall be quashed, as an array returned by one that hath no Franchise shall be quashed.

Challenge to the array for favour: He that taketh this, must shew in certain the name of him that made it, and in whose time, and all in certainty: This kind of Challenge to the favour.

Challenge being no principal challenge, must be left to the discretion and conscience of the Triors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principal Challenge, for the Lord is in no danger of his Tenant, but è converso it is a principal Challenge; but in the other he may challenge for favour, and leave it to tryal. So affinity between the Son of the Sheriff, and the Daughter of the party, or è converso, or the like, is no principal challenge, but to the favour; but if the Sheriff marry the Daughter of either party, or è converso, this (as hath been said) is a principal Challenge, or the like. But where the King is party, one shall not challenge the array for favour, &c. because in respect of his allegiance, he ought to favour the King more. But if the Sheriff be a Vadelet of the Crown, or other menial servant of the King, there the challenge is good; and likewise the King may challenge the array for favour.

For the King.

Note, upon that which hath been said it appeareth, that the challenge to the array, is in respect of the cause of unindifferency, or default of the Sheriff or other Officer that made the Return, and not in respect of the persons returned, where there is no unindifference or default in the Sheriff, &c. for if the challenge to the Array be found against the party that takes it, yet he shall

To the Array.

shall have his particular challenge to the Polls.

In some Cases a Challenge may be had to the Polls, and in some Cases not at all. Challenge to the Polls, is a challenge to the particular persons, and these be of four kinds, that is to say, Peremptory, Principal, which induce favour, and for default of Hundredors. To the Polls.

Peremptory, this is so called, because he may challenge peremptorily upon his own dislike, without shewing of any cause, and this only is in case of Treason or Felony, in favorem vitæ; and by the common Law, the prisoner upon an Indictment or Appeal, might challenge thirty five, which was under the number of three Juries; but now the Statute of 22 H. 8. the number is reduced to 20. in petite Treason, Murder and Felony; and in Case of high Treason, and Misprision of high Treason, it was taken away by the Stat. of 33 H. 8. but now by the Stat. of 1 & 2 Phil. & Mary, the Common Law is revived for any Treason, the prisoner shall have his challenge to the number of 35. and so it hath been resolved by the Justices, upon conference between them in the case of Sir Walter Raleigh and George Brooks: But all this is to be understood when any subject that is not a Peer of the Realm, is arraigned for Treason or Felony. Peremptory Challenge.

But

No Challenge of Peers.

But if he be a Lord of Parliament, and a Peer of the Realm, and is to be tryed by his Peers, he shall not challenge any of his Peers at all, for they are not sworn as other Jurors be, but find the party guilty or not guilty, upon their Faith or Allegiance to the King, and they are Judges of the fact, and every of them doth separately give his judgment, beginning at the lowest. But a Subject under the degree of Nobility, may in case of Treason or Felony, challenge for just cause as many as he can, as shall be said hereafter. In an appeal of death, against divers, they plead not guilty, and one joynt Venire facias is awarded, if one challenge peremptorily, he shall be drawn against all. Otherwise it is of several Venire fac.

The Kings Challenge restrained.

Note, that at the common Law, before the Stat. of 33 E. 1. the King might have challenged peremptorily without shewing cause, but only that they were not good for the King, and without being limited to any number, but this was mischievous to the subject, tending to infinite delays and danger. And therefore it is Enacted, Quod de cætero licet pro Domino Rege dicatur quod juratores, &c. non sunt boni pro Rege: non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumniæ suæ, &c. whereby the King is now restrained.

Principal Challenge to the Polls.

Principal, so called, because if it be found

found true, it standeth sufficient of it self without leaving any thing to the Conscience or discretion of the Triors. Of a principal cause of challenge to the Array, we have said somewhat already; now it followeth with like brevity, to speak of principal Challenges to the Polls, (that is) severally to the persons returned.

A principal Challenge is nothing else but such matter which proves evident favour, or enmity in the Juror; and therefore it belongeth to the Justices to draw the Juror, and not to leave the decision to Tryors, 21 E. 4. 11.

To the Polls.

Principal Challenges to the Poll may be reduced to four heads. First, Propter honoris respectum, for respect of Honour: Secondly, Propter Defectum, for want or default: Thirdly, Propter Affectum, for affection or partiality: Fourthly, Propter Delictum, for Crime or Delict.

Principal Challenges to the Polls.

First, Propter Honoris respectum, As any Peer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marquess, and Duke, for these in respect of Honour and Nobility, are not to be sworn on Juries; and if neither party will challenge him, he may challenge himself: for by Magna Charta it is provided, Quod nec super eum ibimus, nec super eum mittemus nisi per legale judicium

Propter honoris respectum.

A Peer may challenge himself.

um pariũm ſuorum, aut per legem terræ. Now the Common Law hath divided all the ſubjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Viſcounts, Earls, Marqueſſes and Dukes; The Commons are divided into Knights, Eſquires, Gentlemen, Citizens, Yeomen, and Burgeſſes: And in Judgement of Law, any of the ſaid degrees of Nobility are Peers to another: As if an Earl, Marqueſs, or Duke, be to be tryed for Treaſon or Felony; a Baron, or any other degree of Nobility is his Peer. In like manner, a Knight, Eſquire, &c. ſhall be tryed per Pares, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen, or Burgeſſes; ſo as when any of the Commons is to have a Tryal, either at the Kings Suit, or between party and party, a Peer of the Realm ſhall not be impanneled in any Caſe.

Peers and Commons.

Challenge *Propter defectum.*

Secondly, Propter Defectum,

1. Patriæ, as Aliens born.

2. Libertatis, as Villains or Bondmen, and ſo a Champion muſt be a Freeman.

3. Annui ſenſus. i. e. liberi tenementi.

Firſt, what yearly Freehold a Juror ought to

to have, that palleth upon Tryal of the life of a man, or in a Plea real, or in a Plea perſonal, where the Debt or damage in the Declaration amounteth to 40. Marks, Vide Littleton, Sect. 464. Secondly, this Freehold muſt be in his own right, in Fee-ſimple, Fee-tail, for term of his own life, or for another mans life, although it be upon condition, or in the right of his Wife, out of antient Demeſne; for Freehold within ancient Demeſn will not ſerve: but if the debt or Damage amounteth not to 40. Marks, any Freehold ſufficeth. Thirdly, he muſt have Freehold in that County where the cauſe of the action ariſeth, and though he hath in another, it ſufficeth not. Fourthly, if after his return he ſelleth away his Land, or if Ceſty que vie, or his Wife dyeth, or an entry be made for the condition broken, ſo as his Freehold be determined, he may be challenged for ſufficiency of Freehold.

See before, cap. 7. *Quorum quilibet habeat* 4. l. &c.

It ſeems before the Statute 2 H. 5. freehold of any value was ſufficient, for there Freehold of 5. s. was ſufficient. 3. H. 4. 4. by that Statute in all Pleas real and perſonal, where the Debt or damage, or both together amount to 40 marks, the Juror muſt have 40. s. Freehold. In an Attaint they muſt be able to expend 20. l. per annum.

In an accompt upon the Receipt of 100. s. if he count to his damage, 200. s. if the Juror hath but 20. s. or under 40. s. 'tis sufficient, because he shall not recover damages, and so this is not within the Statute 10 H. 6. 18. for the sufficiency of Jurors. See Rolls tit. Tryal 648.

A man seised of the Mannor of Dale enfeoffs a stranger upon condition to pay yearly to J. S. and his Heirs 40. s. Rent. J. S. dies seised of this Rent, and then his Heir takes it. Yet the Heir hath not sufficient Freehold.

Land to the value of 40. s. is given to Husband and Wife and the Heirs of their two bodies begotten, who have issue a son, the Husband gives the Land by fine to an estranger and his Heirs, and dies, the Wife enters, and dies seised, the son hath not sufficient Freehold to be a Juror.

A man seised of Land to the value of 40. s. within the County of Mid. and of Land to the value of 12. within the County of Sussex, and grants a Rent-charge of 40. s. issuing out of all the said Land to a stranger in fee, the Grantee hath sufficient Freehold to be a Juror in both Counties. See many speculative cases upon this subject, in Williams his Reading upon the Statute 35 H. 8. cap. 6. 4. Hun-

4. Hundredorum: First, by the common Law in a Plea real, mixt, and personal, there ought to be four of the Hundred (where the cause of action ariseth) returned for their better notice of the cause; for Vicini vicinorum facta præsumuntur scire. And now since Littleton wrote, in a Plea personal, if two Hundredors appear, it sufficeth; and in an Attaint, although the Jury is double, yet the Hundredors are not double. Secondly, If he hath either Freehold in the Hundred, though it be to the value but of half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth. Thirdly, if the cause of the action riseth in divers Hundreds, yet the number shall suffice, as if it had come out of one, and not several Hundredors out of each Hundred. Fourthly, if there be divers Hundreds within one Leet or Rape, if he hath any Freehold, or dwell in any of those Hundreds, though not in the proper hundred, it sufficeth. Fifthly, if the Jury come de Corpore Comitatus, or de proximo Hundredo, where the one party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. Sixthly, if a Hundredor after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that his notice remains; otherwise as hath been said for his insufficiency of Free-

Challenges *propter defectum hundrorum.*

Hundredors.

No Hundredors.

hold, for his fear to offend, and to have Lands walked, &c. which is one of the Reasons of Law, is taken away. Seventhly, he that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other party to shew it. Eighthly, his Challenge for the Hundred is not simpliciter, but secundum quid; for though it be found that he hath nothing in the Hundred, yet shall not he be drawn, but remain præter H. that is, besides, for the Hundred, and albeit he dwelleth, or have Land in the Hundred, yet must he have sufficient Freehold.

Note, This challenge for want of Hundredors must be given in writing presently, and the other party is to demurr thereto, if opposed.

If a challenge be, that there is not any Hundredor returned, it may be averred to the Court, that there is not any sufficient within the Hundred, which is not within the Fee of the Plaintiff, although this be not returned by the Sheriff, and this be found true by Tryors, the Array shall be affirmed. 45. Ass. 1.

If the King be made party by aid prayer, and sufficient Hundredors do not appear nor are returned, yet the Pannel shall not be quashed, but a Tales of Hundredors shall be

be returned. But betwixt Common persons in such cases the Pannel shall be quashed, and this shall not be only a challenge to the heads. 25 E. 3. 43.

If the Sheriff return quod non sunt plures del Hundred, he shall take of the Hundred adjoyning which shall be sufficient. 19 H. 6. 48.

If the Juror hath sufficient Land within the Hundred, although he doth not dwell within the Hundred, yet he is a sufficient Hundredor. 9 H. 6. 66. nay though he dwell in another County.

If he be not Hundredor at the return of the Venire, but be at the return of the Distringas, yet this doth not take away the challenge.

After four are sworn, or after a challenge to the Polls, there can be no challenge for the Hundred. Rolls tit. Tryal 636. At what time the Challenge must be.

Who shall be a sufficient Hundredor, See Williams his reading aforesaid.

If he dwell or have Assets, within the Leet, Rape, Franchise, or Vill, where the Venue is, he is a sufficient Hundredor.

If he hath Assets, in Rent, Common, or any

any sort Market, Fair, Piscary, Toll passage, Leet, Office of Bayliwick, &c. he is a sufficient Hundredor; otherwise of an advowson, &c.

Challenges *propter affectum.*

3. Propter affectum: & this is of two sorts, either working a principal challenge, or to the favour. And again a principal challenge is of two sorts, either by Judgement of Law, without any Act of his, or by Judgment of Law upon his own Act.

Principal Challenge.

And it is said that a principal challenge is, when there is express favour, or express malice. First, without any Act of his, as if the Juror be of blood or kindred to either party, Consanguineus, which is compounded ex Con & sanguine, quasi eodem sanguine natus, as it were issued from the same blood; and this is a principal challenge, for that the Law presumeth that one Kinsman doth favour another, before a stranger, and how far remote soever he is of kindred, yet the challenge is good. And if the Plaintiff challenge a Juror for kindred to the Defendant, it is no Counterplea, to say that he is of kindred also to the Plaintiff, though he be in a nearer degree. For the words of the Venire facias, forbid the Juror to be of kindred to either party.

Kindred.

Bodies Politick.

If a body politick or incorporate, sole or aggregate of many, bring any action that concerns

concerns their body politick or incorporate, if the Juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred, yet) for that those bodies consist of natural persons, it is a principal challenge. A Bastard cannot be of kindred to any, and therefore it can be no principal challenge. And here it is to be known, that Affinitas, Affinity hath in Law two senses. In its proper sense it is taken for that nearness that is gotten by marriage, Cum duæ cognationes inter se divisæ per nuptias copulantur, & alterâ ad alterius fines accedit, & inde dicitur Affinis. In a larger sense Affinitas is taken also for Consanguinity and kindred, as in the Writ of Venire facias, and other-where. Affinity, or Alliance by Marriage, is a principal challenge, and equivalent for Consanguinity, when it is between either of the parties, as if the Plaintiff or Defendant marry the Daughter, or Cousin of the Juror, or the Juror marry the Daughter or Cousin of the Plaintiff or Defendant, and the same continues, or issue be had But if the Son of the Juror hath married the Daughter of the Plaintiff, this is no principal challenge, but to the favour, because it is not between the parties. Much more may be said hereof, sed summa sequor fastigia rerum. Affinity.

As if he hath formerly tryed the cause, although reversed by Error, or upon the same title; Peremptory Challenge upon Record.

title; if the Record be not shewed, this challenge is not peremptory. For he that grounds a challenge upon a Record, &c. ought to have the Record ready. 33 H. 6. 55. The Record ought to be exemplified. 21 E. 4. 74.

'Tis a good challenge to say the Juror was attainted in an Attaint, or Writ of Conspiracy, but attainder in a Writ of Forgery of false Deeds, upon the Statute 1 H. 5. 3. but 'tis upon 5 Eliz. 14. is not, because this Attainder is given of late time by the Statute 33 H. 6. 55.

In a Writ of Conspiracy 'tis a principal challenge, that the Juror was one of the Indictors, and although the Tryal is now of the Conspiracy, and not upon the first point, viz. the Felony.

In Trespass if one justifie as Master, and the other as Servant; 'tis not a principal challenge to say the Juror passed in the first issue for the Master, but he ought to conclude, & issint favourable. 18 E. 4. 12.

If two plead not guilty, and first one issue is tryed and then the other is tryed; 'tis no challenge to say the Juror tryed the other issue, and gave Damages, of which Damages he shall be charged if he be attainted in an Attaint, for perhaps the Defendant will be found not guilty. That

That the Juror is within the diſtreſs of any of the parties, is a good cauſe of challenge, And ſo it is, if he be within the diſtreſs of any perſon concerned, although no party to the action. As within the diſtreſs of A. the Maſter of the Defendant who juſtifies as ſervant to A. by reaſon of his Freehold; and the iſſue is ſur le franktenement. So for him in reverſion received, within the diſtreſs of the Tenant for life. And ſo in an Action by the Tenant for life, within the diſtreſs of him in reverſion: theſe are good challenges. Deins diſtreſs.

So in an Action by Dean and Chapter, within the diſtreſs of the Chapter, or one of the Chapter, are good challenges.

Conſanguinity of the half blood is a principal challenge: If the Juror be at the ninth degree, if it can be ſhewed it is good. Principal for Conſanguinity.

In an Action by the Dean and Chapter, or Major and Commonalty, Brother to one of the Comonalty, or to one of the Commons, is a good challenge: So to any perſon concerned in intereſt, although no party to the action. As Couſin to the Patron, of the Parſon &c. ſo in Attaint to one of the petit Jury.

But in an Ejectment, and Not Guilty;

pleaded; 'tis no challenge to the Array that the Sheriff is Cousin to the Lessor of the Plaintiff: For it doth not appear that the Title of him in Reversion shall be in question, and he in Reversion is no party to the action. See it so adjudged upon Demurrer, Rolls tit. Tryal 653. But now in our feigned Ejectments it is otherwise, because the Title of the Lessor is only in question.

Principal for Affinity.

'Tis a good challenge that the Juror is Gossip to the Plaintiff, & sic e converso; and so although the son be dead, for the spiritual affinity remains, and so is Curat of the Juror. That the Juror hath married the Sister of the party. That the Daughter of the Uncle of the Juror hath married the Uncle of the party. Cousin to the Wife of the party. These are good challenges although the Wife, &c. is dead, if her issue be alive; otherwise if she be dead without issue, for then the cause of the favour is determined.

But 'tis no challenge to say, the Juror is Brother to one who married the Sister of the party; nor that the Son of the party married the Sister of the Juror: because these are not parties to the action.

In Attaint 'tis a good challenge to the Juror, that he hath married the Sister of the Wife of one of the petit Jury, for the Alliance.

If

If a Juror declare the right of one party, or give his Verdict before hand, or take money, this is a principal challenge: But if he promise a party, this is not a principal challenge, but for favour. Principal for favour.

If the Action depending betwixt the party and Juror, be such as implyeth malice, this is a good challenge: but not if it imply no malice. Principal for malice.

That the party hath an Appeal depending against the Juror, or the Juror against him, or Action of Battery. That they are in debate and wrangling, &c. are good challenges. Not actions of Debt, or Trespass, Quare clausum fregit, &c. Nor that the brother, &c. of the party, hath actions against the Juror.

That the Juror was born out of the Kings Ligeance; for although he came into England an Infant, and is sworn to the King, yet he continues an Alien; and that he is outlawed, for then he is not legalis homo, are good challenges. Peremptory. Alien.

If the Juror says that he will pass for one party, because he knows the verity of the matter, this is no challenge: But if he says 'tis for favour, 'tis a good challenge, if the Tryors find he spoke for favour, and not for truth. For favour.

King.

In an action betwixt the King and a party, the Subject cannot take any challenge for favour, as in an Indictment of Barretry &c. the Defendant cannot challenge a Juror for favour to the King.

How Challenges shall be taken of a Record.

If the Record be in the same Court, it need not be shewn, but if it be in another Court, it ought to be shewed; or else 'tis no principal challenge.

At what time they may be taken.

After the Array is affirmed, there shall not be such challenge to a Juror which would have been a sufficient challenge to the Array. As 'tis not a good challenge that the Juror was impannelled at the denomination of a party, for this had been a good challenge to the Array.

If a man challenge a Juror for non-sufficiency of Freehold, and this is adjudged against him, yet he may challenge for favour. And this shall be tryed, 10 H. 6. 18.

If the Jury upon finding of the principal do not tax the Damages, for which a Venire facias issues to the same Jurors to tax the damages, the parties cannot take any challenge for a cause before the first Tryal. But for a cause arising after they may. And so against the primer Jurors.

The

The King cannot challenge a Juror after he is sworn, unless it be for a Cause arising after he is sworn. King.

If the Defendant challenge the array which is found against him, or he release the challenge and the array is affirmed, and afterwards he challenge a Juror; he ought to shew the cause presently. In what cases he which challenges ought to shew the cause presently.

But if there be two Defendants, and one challenge the array, and afterwards both challenge a Juror; the other shall not shew cause presently.

If any of the Jurors be sworn, and there be not sufficient, for which a Tales is granted, and at the return one of the primer Jurors is challenged, the cause ought to be shewed presently, he being sworn before.

In an action between the King and a common person, as in an Indictment of Barretry, presentment of nusance, &c. the Defendant if he challenges any Juror, must shew the cause presently. King.

But in an Inquest betwixt the King and a stranger, the stranger need not shew the cause presently: For in this case, the King is as a common person of the Realm.

Cause

Cause ought to be shewed before the Tales be perused.

Treat. If both Parties challenge, although for several causes, as if one be for favour, and the other peremptory; yet the Juror shall be drawn without shewing cause.

In what Inquest a Challenge may be. It may be in an Inquest before the Sheriff to enquire of waste, both to the Array and Polls.

But not in an Inquest of Office, as in a writ of inquiry of damages.

In a writ of Right a challenge may be to the Polls del 4 Chivalers return.

Not of Cosinage to the witnesses coming to try the deed in an Assise.

Tryal and Tryors of Challenges. If one party challenge the Array which is affirmed, and afterwards challenge a Juror; he ought to shew cause presently, and this shall be tryed presently; but otherwise of the other, who did not take the Challenge to the Array.

The challenge of him who first challenged, shall be first tryed: Although the first be for favour, and that of the others be riens deins H.

If

If the Venue be of two Counties, and both Pannels challenged, the Esliors shall be one of one pannel and the other of the other.

If the array be challenged, the Court to try the array may chuse two Tryors, according to their discretion. 20 Ass. 15. 19 H. 6. 9.

If an action be depending between the Juror and one of the parties, and for this he is challenged, and the other says that this is brought by Covin; the Tryors may try this: for although the action is of record, yet the Covin is not. What challenge they may try.

The Juror may be examined upon a voier dire, to any challenge that is not to his dishonour; but the Tryors are not bound by his Oath. Evidence.

The tryors after they are sworn may go at large by assent of the parties until another day.

In trespass against two who plead to issue, and a Venire facias is returned, although one accept the Array, yet the other may challenge it, and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessory, for one shall not disinherit the other. In what cases a challenge or affirmance by one shall serve for others,

But

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this; the other shall not be received to say that this is by Covin, but the Juror shall be drawn in favour to the life of man.

And yet in a Præcipe quod reddat by two, and the Tenant challenge the Array, because the Sheriff is Gossip to one of the Demandants, and one Demandant acknowledge the challenge, the other may say that this is not so, and have it tryed. Rolls tit. Tryal 662. &c.

Ley gager. In Gager de ley none shall be challenged for favour or insufficiency &c.

Cosinage. If there be a challenge for Cosinage, he that taketh the challenge must shew how the Juror is Cousin. But yet if the Cosinage, that is, the effect and substance be found, it sufficeth; for the Law preferreth that which is material, before that which is formal.

Dependingon the same Title. If the Juror have part of the Land that dependeth upon the same Title.

Distress. If a Juror be within the Hundred, Leet, or any way within the Seigniory, immediately or mediately, or any other distress of either party, this is a principal challenge.

But

But if either party be within the diſtreſs of the Juror, this is no principal challenge, but to the favour.

If a Witneſs named in the Deed be returned of the Jury, it is a good cauſe of challenge of him. So if one within age of one and twenty be returned, it is a good cauſe of challenge. Witneſs. Infant.

Upon his own Act, as if the Juror hath given a Verdict before, for the ſame cauſe, albeit it be reverſed by Writ of Error, or if after Verdict, Judgment were arreſted. So if he hath given a former Verdict upon the ſame Title or matter, though between other perſons. But it is to be obſerved, that I may ſpeak once for all, that in this or other like Caſes, he that taketh the challenge muſt ſhew the Record, if he will have it take place as a principal challenge, otherwiſe he muſt conclude to the favour, unleſs it be a Record of the ſame Court, and then he muſt ſhew the day and term. Challenges ariſing from the Jurors own Act. Former Verdict.

So likewiſe one may be challenged, that he was Indictor of the Plaintiff or Defendant, either of Treaſon, Felony, Miſpriſion, Treſpaſs, or the like in the ſame cauſe. Indictment.

If the Juror be Godfather to the Child of the Plaintiff or Defendant, or è converſo, this is allowed to be a good challenge in our books. Godfather.

Arbitrator. If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same cause and have been informed of, or treated of the matter, this is a principal challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the parties, though he treated thereof. But a Commissioner chosen by one of the parties, for examination of Witnesses in the same cause, is no principal cause of challenge; for he is made by the King under the great Seal, and not by the party as the Arbitrator is, but he may upon cause be challenged for favour.

Commissioner.

Arbitrator in another matter is no cause of challenge.

Counsel. If he be of counsel, Servant, or of Robes, or Fee, or of either party, it is a principal challenge.

Eat or drink at the parties charge. If any after he be returned, do eat and drink at the charge of either party, it is a principal cause of Challenge, otherwise it is of a Tryor after he be sworn.

Actions of malice. Action brought either by the Juror against either of the parties, or by either of the parties against him, which may imply malice or displeasure, are causes of principal challenge, unless they be brought by Covin, either

ther before or after the return; for if Covin be found, then it is no cause of challenge; other Actions which do not imply malice or displeasure, are but to the favour, as an action of debt, &c. More 3.

In a cause where the Parson of a Parish is party, and the right of the Church cometh in debate, a Parishioner is a principal challenge. Otherwise it is in debt, or any other Action where the right of the Church cometh not in question. Parson and Parishes.

If either party labour the Juror, and give him any thing to give his Verdict, this is a principal challenge. But if either party labour the Juror to appear, and to do his Conscience, this is no challenge at all, but lawful for him to do it. To labour the Jury.

That the Juror is a Fellow Servant with either party, is no principal challenge but to the favour. Fellow Servant.

Neither of the parties can take that challenge to the Polls, which he might have had to the Array. To the Polls.

Note, if the Defendant may have a principal cause of challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition, alledge the same, and pray Process to the Coroners, *Venire facias* to the Coroners.

which he cannot have, unleſs the Defendant will confeſs it; but if the Defendant will not confeſs it, then the Plaintiff ſhall have a Venire facias to the Sheriff, and the Defendant ſhall never take any challenge for that cauſe, and ſo in like caſes. But on the part of the Defendant, any ſuch matter ſhall not be alledged, and Proceſs prayed to the Coroners, becauſe he may challenge the Jury for that cauſe, and can be at no prejudice.

Challenges to the favour.

Challenge concluding to the favour, when either party cannot take any principal challenge, but ſheweth cauſes of favour, which muſt be left to the conſcience and diſcretion of the Tryors, upon hearing their evidence to find him favourable or not favourable. But yet ſome of them come neerer to a principal challenge than other: As if the Juror be of kindred, or under the diſtreſs of him in the reverſion or remainder, or in whoſe right the Avowry or Juſtification is made, or the like: Theſe be in principal challenges, becauſe he in Reverſion, remainder, or in whoſe right the Avowry or Juſtification is, is not party to the Record; otherwiſe it is, if they were made parties by aid, Receipt, or Voucher, and yet the cauſe of favour is apparent; ſo it is of all principal cauſes, if they were party to the Record. Favour. Now the cauſes of favour are infinite, and thereof ſomewhat may be gathered of that which hath been ſaid, and the reſt I purpoſely leave the Reader to the

reading

reading of in our books concerning that matter. For all which the rule of Law is, that he must ſtand indifferent as he ſtands unſworn.

The Subject may challenge the Polls, where the King is party. And if a man be outlawed of Treaſon or Felony, at the Suit of the King, and the party for avoiding thereof alledgeth impriſonment, or the like, at the time of the Outlawry, though the iſſue be joyned upon a collateral point, yet ſhall the party have ſuch challenges, as if he had been arraigned upon the crime it ſelf, for this by a mean concerneth his life alſo. King.

Propter delictum, As if the Juror be attainted or convicted of Treaſon, or Felony, or for any offence to life or member, or in attaint for a falſe Verdict, or for perjury as a Witneſs, or in a conſpiracy at the Suit of the King, or in any Suit (either for the King, or for any Subject) be adjudged to the Pillory, Tumbrel, or the like, or to be branded, or to be ſtigmatiſed, or to have any other corporal puniſhment whereby he becometh infamous, (for it is a maxime in Law, Repellitur à ſacramento infamis) theſe and the like are principal cauſes of challenge. So it is if a man be outlawed in Treſpaſs, Debt, or any other action, for he is Exlex, and therefore is not legalis homo. Challenges *propter delictum*. Infamous. Outlawed.

homo. And old Books have ſaid, that if he be excommunicated, he could not be of a Jury.

Baſtard. A Baſtard may be of a Jury, yet may be challenged if he be of Kindred. Jenk. Cent. 1. Cap. 90.

Who ought to be on Juries. See the Statutes of W. 2. and Artic. ſupra chartas, what perſons the Sheriff ought to return on Juries. And ſee F. N. B. breve de non ponendis in Aſſiſis & juratis; and the Regiſter in the ſame Writ. And ſee there what remedy the party hath that is returned againſt Law.

At what time Challenges muſt be taken. It is neceſſary to be known, the time when the challenge is to be taken. Firſt, he that hath divers challenges, muſt take them all at once, and the Law ſo requireth, indifferent Tryals, and divers challenges are not accounted double. Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. Thirdly, after challenge to the Array, and Tryal duly returned, if the ſame party take a challenge to the Polls, he muſt ſhew cauſe preſently. Fourthly, ſo if a Juror be formerly ſworn, if he be challenged, he muſt ſhew cauſe preſently, and that cauſe muſt riſe ſince he was ſworn. Fifthly, when the King is party, or in an appeal of Felony, the Defen-

fendant that challengeth for cause, must shew his cause presently. Sixthly, If a man in case of Treason or Felony, challenge for cause, and he be tryed indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the Hundred must be taken before so many be sworn, as will serve for Hundredors, or else he loseth the advantage thereof. Hundredors.

In a Writ of Right, the grand Jury must be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any challenge be taken unto them. Writ of Right.

Nota. The Array of the Tales shall not be challenged by any one party, until the Array of the principal be tryed; but if the Plaintiff challenge the Array of the principal, the Defendant may challenge the array of the Tales. After one hath taken challenge to the Poll, he cannot challenge the array. The Array of the *Tales*.

Now it is to be seen how challenge to the array of the principal Pannel, or of the Tales, or of the Polls shall be tryed, and who shall be Tryors of the same, and to whom Proces shall be awarded.

If the Plaintiff alledge a cause of challenge against the Sheriff, the Proces shall be directed

rected to the Coroners; if any cauſe againſt any of the Coroners, Proceſs ſhall be awarded to the reſt; if againſt all of them, then the Court ſhall appoint certain Eliſors, or Eſliors (ſo named ab eligendo) becauſe they are named by the Court, againſt whole return, no challenge ſhall be taken to the array, becauſe they were appointed by the Court, but he may have his challenge to the Polls. Note, if Proceſs be once awarded for the partiality of the Sheriff, though there be a new Sheriff, yet Proceſs ſhall never be awarded to him: for the entry is, Ita quod Vicecomes ſe non intromittat. But otherwiſe it is, for that he was Tenant to either party, or the like.

Coroners.

Eliſors.

Array.

If the array be challenged in Court, it ſhall be tryed by two of them that be impannelled to be appointed by the Court: for the tryors in that caſe ſhall not exceed the number of two, unleſs it be by conſent. But when the Court names two for ſome ſpecial cauſe alledged by either party, the Court may name others; if the array be quaſhed, then Proceſs ſhall be awarded, ut ſupra. If there be a demurr to a challenge, the Judge before whom the cauſe is to be tryed, may determine it, or adjourn it to be heard another time. Stiles 464. Vide Bulſtr. 1. part. 114.

Two Tryors.

Demurr to a Challenge, how determinable.

If

If a Pannel upon a Venire facias be returned, and a Tales, and the array of the principal is challenged, the Tryors, which try and quash the array, shall not try the array of the Tales; for now it is, as if there had been no appearance of the principal Pannel; but if the tryors affirm the array of the principal, then they shall try the array of the Tales. If the Plaintiff challenge the array of the principal, & the Defendant the array of the Tales, there the one of the principal, & the other of the Tales shall try both arrays. For other matter concerning the Tales, see in Cooks Reports matters worthy of observation. When any challenge is made to the Polls, two Tryors shall be appointed by the Court; and if they try one indifferent, and he be sworn, then he and the two Tryors shall try another: and if another be tryed indifferent, and he be sworn, then the two Tryors cease, and the two that be sworn on the Jury shall try the rest.

Array of the Principal and *Tales.*

Two Tryors.

If any of the Jury, after some of them be sworn, be challenged, those that are sworn are to say, whether he that is challenged be indifferent or not. But if the first or second man be challenged, then the Court doth use to appoint some of them, (who it pleaseth), that shall be afterwards sworn to try the indifferency of the person challenged.

Tryals of challenges.

Rules concerning Challenges.

1. All challenges must be taken before the Jurors are sworn.

2. If one challenge a Juror, and it be found against the challenger, he may not challenge the Juror for a second cause.

3. If one challenge the array and it be found against him, he may not afterward challenge any of the Polls, without shewing cause presently, and this shall be tryed presently.

4. No challenge shall be admitted against the Tryors, appointed by the Court.

Tryal of Challenges.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the Tryal is to be had by two Counties, the manner of the tryal is worthy of observation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they shall try themselves, and they shall choose the grand Assise, and try the challenges of the parties. If the cause of challenges touch the dishonour, or discredit of the Juror, he shall not be examined upon his Oath; but in other cases he shall be examined upon his Oath, to inform

Juror examined.

the

the tryors. If an Inquest be awarded by default, the Defendant hath lost his challenge; but the Plaintiff may challenge for just cause, and that shall be examined and tryed.

Wheresoever the Plaintiff is to recover per visum juratorum, there ought to be six of the Jury that have had the view, or known the Land in question so as he be able to put the Plaintiff in possession, if he recover. View.

In Proprietate probanda, and a Writ to inquire for waste, the parties have been received to take their challenges. But passing over many things touching this matter, I will conclude with the saying of Bracton, Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt, sufficiant exempli causa. 1 Inst. 157, 158. Challenges.

Treat doth signifie as taken out or withdrawn, and is applied to a Juror, that is withdrawn by consent, or removed and discharged by challenge. Treat what.

A Juror sick was withdrawn, and another sworn. Palmers Reports 411.

If the Defendant do not appear at the tryal when he is called, he loseth his challenge Challenge lost.

to the Jurors although he doth afterwards appear.

A wrong name. 'Tis a good challenge to a Juror to say he is returned by another name in the Pannel.

No Freehold. A Juror appeared and said he had no Freehold, and prayed that he might not serve, yet the Judge would not spare him; for he may have an action against the Sheriff for returning him. Rolls 2 part. Reports 483.

CAP.

CAP. The Challenge pro defect. Hundred, muſt be written in Parchment, and the Councilmuſt arraign it in French, upon which the Defendant may take iſſue or demur. The Clerk or Aſſociate in Court muſt call the Jury over, and aſk if they have any Lands within the Hundred, or had at the time of the Array of the Pannel, and whether they dwell, or did dwell, in the ſame. And upon examination if it appear clearly, that they have no Lands or Tenements, nor dwell in the Hundred; then the Clerk is to mark them by the ſide of every of their names thus [pr ter Hundred.] but if he find there be two Hundredors, he is to reſort back to the præter Hundred. and ſwear them in order. So that you ſee the Tryal whether Hundredors or not, is determined by the Courts examination by the Poll ſeverally. But if the Council demur, and the other ſide joyn in demurrer, the Judge of Aſſiſes may affirm the Challenge, and over-rule the Demurrer, or allow the Demurrer good, and proceed to the Tryal of the Cauſe; or if the Judge doubt, it may be determined in Bank, but this is great delay. If the challenge be adjudged good, the Court awards, Que le pannel il ſoit caſſe.

At Common Law there ought to have been 4 Hundredors returned and appeared in all actions pro meliori notitia cauſæ in controverſia, for vicini vicinorum facta ſcire præſumuntur.

In Cities, Corporations, Burroughs, and Towns, and Counties, this Challenge cannot be.

* *

tur. But by the Statute 35 H. 8. ca. 6. ſix are to be returned and appear. But ſince by the Statute 27 Eliz. ca. 6. if two Hundredors be returned and appear, it is ſufficient in all perſonal actions: But in real actions there muſt be ſix, or elſe Remanet pro defectu Jur.

The Court ſhall appoint two Tryors in a challenge to the Poll, and if they find two indifferent the firſt Tryors ſhall be diſcharged, and the two that are found indifferent, being ſworn to try the Iſſue, ſhall alſo be ſworn to try the reſt of their Fellows.

At Common Law there uſed to be returned 24 upon the Venire, and afterwards a Habeas corpora with a Decem Tales, and if a full Jury did not appear or were challenged, then a Diſtringas with an Octo Tales, and ſo to the Duo Tales, if there was not a full Jury. And this was the courſe until the Statute 35 H. 8. which gives the Tales de circumſtantibus at the Aſſiſes, &c. and by the Stat. 5 Phil. & Mariæ ca 7. where the King, Queen, or Inferior, &c. are parties.

Tales de circumſtantibus may be in the caſe of Aliens.

A Challenge may be taken to thoſe of the Tales de circumſtantibus.

By the Statute 33 Ed. 1. The King and thoſe who proſecute for him, muſt ſhew their cauſe of Challenge, as betwixt party and party;

party, and left to the discretion of the Justices.

The King or any one authorised for him may release his challenge. Where the party may challenge, the King may challenge.

'Tis no challenge to say, the Juror is the Kings Tenant, or that he is favourable to the King, but 'tis good to say, the Sheriff or Juror bears grudge or malice to the Defendant where the King is party. If the Juror hath any Freehold 'tis sufficient, although not to 40 s. a year: For the Statute which injoyns that, speaks only betwixt party and party.

The first, who challenges be he Plaintiff or Defendant, shall have the preference and advantage of his challenge. If a Juror be once challenged and withdrawn upon the principal; he cannot serve upon the Tales, if he doth 'tis Error, and Judgement may be stayed. And so if he be challenged, and a Jury remain pro defect. Juratorum, if he be sworn upon a new Distringas, 'tis Error, not helped by any Statute of Jeofailes, and a mistryal and a Venire facias de novo may be awarded. Cro. Eliz. fol. 429. Whitbys Case.

Elisors may be sworn in some cases to return and impannel all Juries, as should upon

upon any Venire facias, Habeas Corpora or Distringas Jur. come to their hands impartially, indifferently and without favour or affection, or at the denomination of any person.

The Record of Attainder Conviction, Excommunication Outlawry, &c. or a Copy thereof ought to be produced, to prove the cause of challenge thereupon.

Where bodies politick or Corporate are concerned, a challenge may be taken which arises from the individuals, as Brother to one of the Prebendaries, is a good challenge where the Dean and Chapter are parties, &c. Hob. 87. so a Parishioner, where the right of the Church comes in question at the Suit of the Parson. 17. Ass. 15.

In High-Treason, the prisoner may peremptorily challenge to the number of 35. which is under the number of 3 Juries but in Petite Treason, murder or Felony the number is reduced to 20. The prisoner may challenge any that are Witnesses against him.

Where the King is party the Defendant must shew the cause of his challenge instantly.

After a challenge for cause, the prisoner may challenge the same person peremptorily.

CAP. X.

Place this betwee

CAP. X.

Of what things a Jury may inquire; when of ſpiritual; when of things done in another County, or in another Kingdom; when of Eſtopples, and when not; when of a mans intent, &c.

BIBLIOTECA MAGNA

THe next words in the Writ, which have not yet been taken notice of, are theſe, per quos rei veritas melius ſciri poterit; and this is the chief end of their meeting together: No Court can give a right Judgement, unleſs the truth of the fact be certainly known; and to find out this truth, no way is like to this of Juries: for they do not only go upon their own knowledge, though they are Neighbours to the place where the queſtion is moved, and ſo are preſumed to have a better knowledge of the fact, than any others; For vicinus facta vicini præſumitur ſcire; But leſt this preſumption ſhould fail, the Law allows other Evidence to be given to them, by

See more of this matter, cap. 13.

Ex facto Jus oritur.

by which they may more certainly and confidently give their Verdict of the issue, which is meant by this word Rei.

And here, it will not be amiss to give you a brief description, de quibus rebus, what the Inquest may inquire of, and find.

Of the Law.

Wherefore, though it be true, that a Jury shall not be charged, nor meddle with a matter of Law; and if they do, and find it, their Verdict as to this shall be void; yet daily experience (as well as Littleton, Sect. 368.) tells us, that they may take upon them the knowledge of the Law, and give a general Verdict; though to find the special matter is the safest way for them, because, if they mistake the Law, they run into the danger of an Attaint.

MVSEVM BRITANNICVM

In the Case of Manby and Scott, adj. Trin. 13 Car. 2. B. R. one question was if the Verdict was well found, in an action of the case against the Husband for Wares bought by the Wife; the Verdict finding, that the Wares were necessaries, and according to her degree, whereas (as was objected) they ought to have found the degree of the party, and the value of the Wares and left it to the Court to judge.

But it was answered and resolved that the Court. i. e. the Judge before whom 'tis

'tis tryed informs the Jury of the matter of Law, and accordingly they find, and so it belongs not to this Court.

Broughton a Reader of the Temple brought a Bill by Quo minus in the Chequer against Prince for maintaining a suit against the Stat. &c. Prince pleads that he was admitted in the Inner Temple, and student for many years there, that he was Consiliarius, in Lege eruditus, and took his Fee in that cause. B. replied, de Injuriâ suâ propriâ absque hoc quod in lege eruditus, &c. & hoc petit &c. & deus defendit similiter.

It was moved that the Defendant should demurr to the Replication. Atkinson, excepted to the Traverse and Conclusion; for it can't be tryed by a Jury; for (says he) if matter in Law be to be tryed by the Judges, à fortiori, the learning of the Law ought to be tryed by them.

Per Manwood Ch. Baron, It shall be tryed by the Country. 3 Leo. 237. Broughton vers. Prince; which case is cited 3 Cro. 728. to be otherwise ruled, yet, it was allowed there a good issue, whether a Parson of a Parish could speak Welch.

Hut. 20, 21. Whether a plaint was levied according to the Custom, was tryed by a Jury, who are directed by the Court, as

to

to the plaint, and whether it were pursuant to the Custom, and are to find according to such directions.

Of a mans intent.

In many cases, the Jury are to inquire of the knowledge and intent of a man, as where the Nar. is, that the Defendant kept a Dog which killed the Plaintiffs Sheep, sciens canem suum ad mordendos oves consuetum; though sciens be not traversable, yet the Jury upon Evidence must inquire of it. lib. 4. 18.

Of spiritual things.

In some cases, a Jury may try and find a spiritual thing, as a Divorce, Patrimony, &c. and must take notice thereof, upon pain of Attaint. li. 4. 29. lib. 9. lib. 7. 43. vide hic cap. 2.

The Jurors of one County, may find any transitory thing done in another County: May some times they must find local things in another County; as if the Heir pleads riens per discent, and the Plaintiff replies, Assets in a Parish and Ward within London, the Jury may find Assets in any County; in the same case against an Executor, who pleads plene administravit; the Jury may likewise find Assets in any part of the world. And the Reason is, because the place is only named

In Trespass *Quare Clausum fregit*, in the County of D. where the Trespass was committed in the County of S. upon Not guilty, if the Jury find the Defendant guilty in the County of S. their Verdict is void. But if they find him Guilty generally, an Attaint lyeth. *Finch.* 400. Because this Trespass is local; and what is local cannot be inqured of by men of another County, for they can have no conusans of it.

named for neceſſity of tryal. But where the place is part of the iſſue, it is otherwiſe. And therefore if I promiſe in one place to do a thing in another, and iſſue is upon the breach, the Jury ought to come from the place of the breach. But if I promiſe in London, to do a thing at Burdeaux in France, and iſſue upon the breach, yet this ſhall be tryed in London for neceſſity, becauſe otherwiſe it would want tryal, the Jury muſt inquire of the breach at Burdeaux. But if I promiſe in France, to do a thing in France, ſo that both Contract and performance is beyond Sea, this wants tryal in our Law. lib. 6. 47. li. 7. 23, 26, 27.

Of things done in another Country or Country. Vide cap. 8.

Rolls tit. Tryal fol. 571. 624.

In the Caſe of Drake and Beere. Trin. 15 Car. 2. B. R. this difference was agreed by the Court, viz. That a Jury in an Inferiour Court may inquire of things out of the Juriſdiction, if they be but for encreaſe of Damages, as is 1 Cro. 571. Ireland verſ. Blackwell, but if they inquire of any thing iſſuable out of that Juriſdiction, it is nought, 1 Cro. 101. 2 Cro. 503.

Error was brought to reverſe a Judgement given in the Palace Court, in Indebitat. for that the Defendant was indebted to the Plaintiff Infrà Juriſdictionem for Nurſing of a Child, not ſaying the Nurſing was Infrà Juriſdictionem.

Wadh. Windam Juſt. held it good, for that it is a debt every where, and not like a debt that ariſeth by matter collateral: But Twiſden Juſt. doubted. Whitehead verſ. Browne. Paſch. 15 Car. 2. B. R.

Eſtoppels.

When the Eſtoppel is found, the Court may judge according to the eſpecial matter.

The Jury may find Eſtoppels, as the taking of a Leaſe of a man's own Land, by Deed indented; or the delivery of a Deed before the date, as in Debt by an Adminiſtrator upon a Bond dated 4 Aprilis, 24 Eliz. The Defendant pleaded, that the Inteſtate dyed before the date of the Obligation, and iſint nient ſon fait, upon which they were at Iſſue, and adjudged that the Jury might find that the Bond was delivered the 3d of April, becauſe they are ſworn ad veritatem dicendum; though the parties are eſtopped to plead a Deed was delivered before the date; but they may plead a delivery after the date, becauſe it ſhall never be intended, that a Deed was delivered before the date, but after it may. p. 34. 144.

Eſtoppels.

But if the Eſtoppel, or admittance be within the ſame Record, in which Iſſue is joyned, then the Jurors cannot find any thing contrary to this, which the parties have affirmed, and admitted of Record, though it be not true: For the Court may give judgment upon matters confeſſed by the parties; and the Jurors are not to be charged with any ſuch thing, but only with ſuch in which the

the parties bary. li. 2. 4. li. 4. 53. Co. Lit. 227.

A Decree in Chancery shall be tryed by a Jury, and not by it self; for it is not a Record, but a Decree Recorded. The Chancery, as it is a Court of Equity is not a Court of Record: But touching things agitated in the Petty Bag Office, it is a Court of Record. Decree.

The Jury may find Deeds, or matter of Record, if they will, though not shewed in Evidence. Finch 400. They may inquire of things done before the memory of man. lib. 9. 34. Records not shewed.

Null tiel Record is not to be tryed by a Jury, but upon the general issue, &c. they may find a Record.

The Jury may find a Warranty, being given in Evidence, though it be not pleaded: May, the Jury may find that, which cannot be pleaded, as in Trespass, upon not guilty; The Jury may find that the Defendant leased Lands for life, upon Condition, and entred for the Condition broken; Tho' this cannot be pleaded without Deed, yet the Jury may find it. Lit. Sect. 366. Warranty. Condition.

Where a Collateral Warranty binds this may well be given in Evidence: For al-

though it doth not give a right, yet in Law this shall bar and bind a Right. Lib. 10. 97.

But this matter comes more properly under the Title Evidence; wherefore we will proceed to that.

See also in Chap. 13.

CAP.

CAP. XI.

Evidence and Witneſſes.

EVidence, Evidentia: This word in le- Evidence.
gal underſtanding (ſaith Coke 1. Inſt. 283.) doth not only contain matters of Record, as Letters Patents, Fines, Recoveries; Inrollments, and the like, and writings under Seal, as Charters and Deeds, and other Writings without Seal, as Court-Rolls, Accounts, and the like, which are called Evidences, Inſtrumenta. But in a larger ſenſe, it containeth alſo Teſtimonia, the Teſtimony of Witneſſes, and other proofs, to be produced and given to a Jury for the finding of any Iſſue, joyned between the parties: And it is called Evidence, becauſe thereby the point in Iſſue is to be made evident to the Jury: Probationes debent eſſe evidentes (id eſt) perſpicuè & facile intelligitur.

And this Evidence (with Bracton) we may term probatio duplex, viz. viva, as Witneſſes,

Witnesses, vivâ voce; and Mortua, as by Deeds, Writings, and Instruments; and violenta præsumptio, in many cases, is plena probatio, and therefore if all the Witnesses to a Deed be dead, then the Deed shall receive Credit; per collationem sigillorum scripturæ, &c. but especially if there hath been a continual and quiet possession; which is a violent presumption. 1 Inst. 6. for no man can keep his Witnesses alive.

Presumption.

Proof.

If a thing be generally referred to proof this shall be intended proof by Jury; but if other manner of proof be agreed upon, that shall take away the proof which the Law generally intends by Jury: Hob. 127. As if I promise to pay what mony you prove B. borrowed; this may be proved in the same action brought upon the promise. Vide Rolls tit. tryal 594, 595.

Witnesses.

Men that are so branded with Infamy, that they cannot be Jurors, for which see before, who may be Jurors, cannot be Witnesses; yet per Glyn Ch. Just. and Newdigate Just. Mich. 1657. B. R. Conviction of common Barretry hinders not from being a witness, but Maynard, Sergeant, held strongly against it.

At Lent Assises, Suff. 1657. St. John Ch. Just. C. B. would not allow one who had been whipped for petty Larceny, to be a Witness;

neſs; but Earl Sergeant ſaid, they ought to be ſtigmatici that are diſabled from being Witneſſes: Yet per Roll. Ch. Juſt. one burned in the hand for Felony, may be a Witneſs; for he is in capacity to purchaſe Lands, and his fault is purged by his puniſhment. Stiles 388.

The Wife cannot be a Witneſs for, or against her Husband, 1 Inſt. 6. that is in caſe of a common perſon between party and party, but between the King and the party, on an Indictment ſhe may, although it concerns the Feme her ſelf, as in the Lord Audley's Caſe, Hutt. 116. So ſhe may have the Peace against her Husband. Who may be Witneſſes.

And ſo it was reſolved in John Browne's Caſe, Trin. 25 Car. 2. B. R. on the Stat. of 3 H. 7. cap. 2. vid. 1 Cro. 492.

The King cannot be a witneſs by his Letters under his Signet manual: One attainted of Piracy cannot be a witneſs to prove another guilty. If he accuſed another before he was attainted, and afterwards confeſſes he wronged him, this confeſſion ſhall be rejected, becauſe he is attainted. A woman cannot be a witneſs to prove a man to be a Villain. Co. Lit. 6. 8.

Neither can the party to the uſurious Contract, be a Witneſs againſt the Uſurer, in an

an Information upon the Statute of Usury. But Kinsmen never so near, Tenants, Servants, Stewards, Counsellors, and Attorneys, &c. may be Witnesses. A Counsellor may be a Witness to the Agreement, &c. but not to validity of an assurance, nor to the Counsel he gave. March, Rep. 43. If a Witness being served with Process, and having money sufficient to bear his charges, (or less if he accept it) do not appear to give his testimony, he forfeits 10 l. to the party damnified, and must recompence his damages. 5 Eliz. 9. If a Witness commit wilful perjury, he loseth 20 l. shall be imprisoned 6. months without bail, stand in the Pillory, and be disabled to be a Witness, so shall the suborner, who procures the perjury. 5 Eliz 9.

A party robbed is allowed a good witness in his own action against the Hundred, for he is not bound, nay is to be blamed, to tell any one what charge he carries with him; and if he should not testifie, the Law would be often fruitless for want of Evidence, or else more Robberies committed by the parties discovering his money.

In the Case of Brereton and Tatam, Mich. 1656. B. R. Glyn. Ch. Just. Cited the Lord Chandoi's Case in this Court, where one Gates an Executor was produced to prove the Will as a witness, to which he (as Counsel)

sel) excepted, because of his Executorship. It was answered that he had fully administred: He replied, the Assets might afterwards come to his hand; but the Court resolved that it would not be presumed to barr his Testimony, which was allowed in the principal Case, being in Ejectment.

It's no good exception to a Witness that he hath common per cause of Vicinage in the Lands in question, because its but an excuse of Trespass, and no interest. Clapham's case. Mich. 1657. B.R.

The same of common of Shacke.

If Obligee devises the debt to the Obligor, and his Executors deliver up the Bond in satisfaction of the Legacy which is cancell'd, and after the validity of the Will is questioned, viz. whether the Testator was compos, &c. the Obligor is a good witness for the will, because by the cancelling of the Bond his debt was discharged. But Contr. in case of a Mortgage, for though the deed be cancelled, if it be no good will, he must pay the mony. Goodman versus Turbervill. Mich. 1657. B. R.

An Action was brought by the Corporation of the Weavers of Norwich, for a penalty against a Weaver for working in his Trade in Harvest time, contrary to an Ordi-

nance by them made. And Atkins, Juſt. allowed one of the Corporation to be a witneſs, though one moiety of the penalty was due to the Corporation. Lent Aſſiſe 1657.

In a Tryal at Bar, where an Eſtate for Life is limited to I. S. remainder to the poor of the Pariſh of Greenwich by Will; the Inhabitants of Greenwich were allowed to be witneſſes to prove the Will. Townſend and Roane Mich. 1658. B. R.

An Action of Debt was brought, Summer Aſſ. Suff. 1669. by the Town of Ipſwich for 50 l. a Fine ſet on one choſen Common Council Man (called their prime Conſtable) for refuſing to renounce the Covenant, &c. And the Town-Clerk (though a Freeman) was allowed a witneſs to prove Election, Refuſal, &c. and the Fine ſet, which is for neceſſity, for that none other are or ought to be preſent at thoſe Acts. Rainsford Juſt.

Per Hale Ch. Juſt. Norf. Summer Aſſ. 1668. A Freeman of Lynn is not an allowable witneſs to prove the cuſtom of Foreign boughs and Foreign ſold in that Town. Harwich verſ. Twels.

As to Witneſſes priviledges:

One was ſub-poena'd ad teſtificandum, and prayed a priviledge from being arreſted, which

which was granted, and per Cur. it will ſuperſede an Arreſt on mean proceſs, but not upon an Execution; yet the Sheriff in that Caſe may be committed for his Contempt. Hen. Nevil's caſe Mich. 15 Car. 2. B. R.

Detaining of Witneſſes:

Sir Jo. Jackſon was Convict on an Information for preventing of Evidence to be given on an Indictment of Perjury againſt Fenwick and Holt, who had been witneſſes for Sir J. J. he arreſted ſome witneſſes, and gave mony to others, and ſo they were acquitted: He was fined 1000 Marks, 1 months impriſonment, behaviour for 12 months. Hill. 1663. B. R.

Proofs to determine matter of Fact, and to be offered to a Judge and Jury, are of two ſorts. Firſt Living, as by Witneſſes, and to a Jury one witneſs is ſufficient. And Dead, as matters of Record, as Letters Patents, Fines, Recoveries, Inrollments, &c. Writings ſealed and delivered; as Feoffments, Leaſes, Releaſes, &c. And without Seal, as Court-Rolls, Accounts, &c. And if the Caſe be between the King and a Priſoner, he is firſt to ſay what he can himſelf, and then all that can ſay any thing againſt him are to be heard upon Oath, and then others may be heard for him, but not upon Oath: And according Proofs.

to this Evidence on both sides, or without any Evidence at all, the Jury are to give their Verdict, according to their knowledge and Oaths.

Such persons as are infamous, as are persons attainted of Felony, or of a false Verdict, or of a Conspiracy, or of Perjury, or of Forgery, upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. and such as have had Judgment, to lose their Ears, or stand on the Pillory or Tumbrel, or have been stigmatized or branded, and Infidels, Men not of sound memory, or not of discretion, or such as are interested in the cause, or have benefit, are not competent witnesses. Co. 1. Inst. 6. but we see Jews are daily admitted witnesses.

Plene Administravit. An account given to and allowed by the Ordinary, is not good Evidence; nor a

Pedigree. Pedigree by a Herald of Arms, to prove an Heir, but it must be proved by Deeds, Records, or Witnesses.

Recognisance. If the issue be a Recognizance or not, a Recognizance with a defeasance is good Evidence. Plo. 14. So of an

Agreement. Agreement, a special Agreement will prove it. Plo. 8.

Tenure in *Capite.* A Licence to alien Land, or a pardon for alienation of Land, was held by a common presumption, to be a good proof that the Land was held in capite.

A

A thing which is concluded in the Eccleſiaſtical Court, which doth concern Lands, is not to be given in Evidence; for the Courts of Common Law are not to be guided by their proceedings. Eccleſiaſtical proceedings.

Ancient Deeds may be given in Evidence, although the execution of them cannot be proved. Ancient Deeds.

He that takes out a Copy of part of a Record, muſt at leaſt take out ſo much as concerns the matter in queſtion, or elſe the Court will not permit it to be read. Copy of a Record.

If one produce a Leaſe made upon an Outlawry, in Evidence to a Jury to prove a Title, he muſt alſo produce the Outlawry it ſelf. Outlawry.

To prove a Feoffment a Deed of Feoffment, is ſhewed, but no Livery is indorſed, if poſſeſſion has gone with the Deed, it is good Evidence. Rolls Reports 1. part 132. Feoffment.

Upon Not Guilty to an Information upon a penal Law, a Proviſo to excuſe him may be given in Evidence. Jones Reports 320. Proviſo.

If a man preſcribe in a non decimando generally, he cannot give a Bull in Evidence. Palmers Reports 38. *Non decimando.*

A Deed

Deed. A Deed with the Seals torn off was admitted to declare uses. Palmers Reports 403, 405.

Records. Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence and so may any thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

Fine. A Fine, or common Recovery, may be given in Evidence, though it be not under the great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the part indented is the usual Evidence that there is such a Fine, though they which saw the Fine, are also good Evidence. Plow. 410. Stiles 22.

Depositions. Depositions in the Ecclesiastical Court cannot be given in Evidence, though parties be dead. March 120. A Defendants answer in an English Court, is good Evidence against him, but not against others. Godbolt, 326. Where the evidence proves the effect and substance of the issue, it is good. By order of Court the Depositions taken of a Sick Witness may be given in evidence.

Assets. As upon plene administravit, if it be proved that the Executor hath goods of the Testa-

tors

tors in his hands, he may give in Evidence, that he hath paid of his own money for the Testator, to the value of those goods. Co. Lit. 283. Dyer. 2.

So if a Lease be pleaded, a Lease upon Condition is good Evidence. 1 H. 8. 20. because the Genus comprehends the Species. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence. 44 E. 3. 39. A special agreement is evidence for an agreement. Plo. 8. Lease.

But if a Feoffment be pleaded in Fee, upon issue non feoffavit modo & forma, a Feoffment upon Condition is no Evidence, because it doth not answer the issue; and whersoever Evidence is contrary to the issue, and doth not maintain it, the Evidence is not good. 11 H. 4. 3. Feoffments 41. agreement in reversion is no evidence but a Lease and Release is. 20 H. 7. 5. If the Indorsment be of a Livery by Attorney, the Letter of Attorney must be shewed. Feoffment.

Upon an Assumpsit to the Husband, an Assumpsit to the Wife, and his agreement, is good evidence. 27 H. 8. 29. upon non assumpsit to a special promise, payment is no evidence per 3 Judges. Assumpsit.

In

Challenge. In challenge to the array, because made at the denomination of the Sheriffs Clerk, evidence at his Bayliffs denomination, is good, because favourably made is the substance. 38 H. 6. 9.

Assets. If the issue be in a Suit against an Executor, Administrator, or Heir, Assets in London; to prove Assets in another place, is sufficient. Li. 6. 47. Dyer 271.

Accompt. Accompt pleaded before two; Accompt before one, is good Evidence. Hob. 55. because the accompt is the substance.

What Evidence upon the general issues. Upon the general issue, the Defendant may give any thing in Evidence, which proves the Plaintiff hath no cause of action, or which doth intitle the Defendant to the thing in question.

Detinue. But if he hath cause of justification or excuse, it must be pleaded: wherefore upon non detinet, in detinue, the Defendant may give in Evidence a gift from the Plaintiff; for that proveth that he doth not detain the Plaintiffs goods; but he cannot give in Evidence that the goods were pawned to him for money, and that it is not paid, but he must plead it. 1 Inst. 283. For the property is in the pledger.

Upon

Upon Not guilty, in Battery, Son assault demesne, is no Evidence; for thereby the Battery is confessed. Ib. neither is Not Guilty, good Evidence upon Son assault demesne. In Battery.

Upon Not Guilty, in Trespass, Insufficiency of the Plaintiffs mounds, or to justifie for a Rent-Charge, Common, Licence, Son assault demesne, or the like, is no good Evidence. Ib. but to prove a Trespass before or after the day laid in the Declaration is good. 1 Inst. 283. Trespass.

So upon the Plea, Nul Wast fait, in an Action of Wast, he may give in Evidence any thing that proveth it no Wast, as by Tempest, by Lightning, by Enemies, &c. But he cannot give in Evidence any justifiable Wast, as to repair the House, or the like; nor a reparation of the Wast, before the action brought. Ib. Wast.

Upon non est factum, 'Tis no Evidence, to shew the Bond that was made upon an usurious Contract, or that the Sheriffs name is mistaken, &c. in a Bail-Bond; or that the Bond is joynt, or several, or delivered at another place; or that it is void by Statute. But it must be pleaded in abatement. Ib. Hob. 72. Non est factum.

But to prove that the Seal was broken off, and put on again; or to prove a Rasure of the Deed; delivered as an Escrow, &c. this is good Evidence. Li. 5. 119. 11. 27. If 'twere done before the action brought; but if the Seal was broke off, &c. by chance, after issue joyned, the Jury may find it specially.

To prove the Sealing and delivery of a Deed, and not know the party that did it, is not good evidence; but if he knows the party upon sight of him, it is good enough. Kelw. 59.

Trover. Upon Not Guilty, in Trover and Conversion, a Demand, and denyal of the Goods, is good Evidence. Plo. 14. li. 10. 57. Cro. 1. part. ult. pub. 495. Hob. 187.

Plenè Administravit. Upon plenè Administravit, the Executor cannot give a Judgement in Evidence. Kelw. 59. nor payment of Debts by Contract, in Debt brought upon an Obligation. A Cup pawned and redeemed with the Executors own money, is good Evidence; but a recovery ought to be pleaded: upon nil debet, in Debt for Rent, That the Lessor entred into part of the Land, is no good Evidence. Goldſ. 81. But non demisit, is, 9 H. 7. 3.

Up-

Upon Not guilty, in an Action upon the Statute de parco fracto, That the Plaintiff hath no Park, is good Evidence. 19 H 8. 9. Parco fracto.

So upon Not Guilty, in Treſpaſs, in the Plaintiffs Warren, Evidence that he hath no Warren, is good. 10 H. 6. 17. Kitchin. 119. Warren.

A Shop-book no evidence after a year. 7 Jac. cap. 12. Shop-books.

In Debt for Arrerages of an accompt upon Nil debet modo & forma; No accompt is good Evidence. 2 H. 6. 26. Upon Not guilty in Treſpaſs, a Leaſe for years, 12 H. 8. 2. or that locus in quo, &c. is the Freehold of another, 4 E. 3. 45. is good Evidence; but upon this he cannot juſtifie his entry upon the place by a ſtrangers Licence, or Command, Br. general iſſue 81. becauſe this is a juſtification by way of excuſe: Neither is a Leaſe at Will, good Evidence in this caſe. Accompt. Treſpaſs.

So upon Not guilty, in Treſpaſs for goods, 'tis good evidence that the goods were a ſtrangers. 9 H. 6. 11. But that they were a ſtrangers, and that he as Servant to the ſtranger, or by his commandment, took them from the Plaintiff, is not good, Br. general iſſue 81. becauſe the Treſ- Not guilty in Treſpaſs.

pais is confessed. But that the stranger gave them to the Defendant is good. 9 H. 6. 11. In Trespass the Buttals must be proved as they are laid.

Payment by presumption.

If the Defendant plead payment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any use paid for it many years, common presumption is good evidence, that the money is paid, and the Juries use to find for the Defendants, in such cases.

Trespass another day.

If the Trespass were in truth done the 4th. of May, and the Plaintiff alledgeth the same to be done the 5th. of May, or the first of May, when no Trespass was done; yet if upon evidence, it falleth out that the Trespass was done before the Action brought, it sufficeth. 1 Inst. 283.

Deed.

'Tis dangerous to permit evidence to a Jury by Witnesses, that there was such a Deed, which they have seen or read, or prove the Deed by a Copy, because the Deed may be upon Condition, Limitation, or power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect, and void, which the Witnesses could not perceive; yet in cases of extremity, as where the Deed was burned, or lost by some

some other notorious accident, the Judges may at their discretion, allow them to be proved by Witnesses. li. 10. 92. and so of a Record.

In Case against an Executor; whereas the Testator was indebted to the Plaintiff, the Executor promised to pay the debt, in consideration the Plaintiff would forbear to sue him; the Executor may give in evidence upon Non assumpsit, that there was no Debt, or that he had no Assets tempore promissionis, for then there would be no Consideration. li. 9. 94. William Banes Case, upon the issue nevnques Executor to prove an Administration granted to him, is good evidence. Dyer. 305. Executor.

Evidence shall never be pleaded, but the matter of fact shall be pleaded, and if it be denied, the evidence shall be given to the Jury, not to the Court. lib. 9. 9. Evidence.

Evidence, that the Wife of every Copyholder, shall have the Land durante viduitate, will not maintain the issue, that the Custom of a Mannor is, that she shall have the Land during her life, after her Husbands death, because, though durante viduitate, imports an Estate for life, yet an Estate durante vita, is more large and beneficial. li. 4. 30. Estate for life.

Things done before the memory of man, in another County, or in another Kingdom What may be given in Evidence.

now, may be given in Evidence to a Jury, as Assets in another County, &c. More 47. See li. 4. 22. 9. 27. 28. & 34. li. 6. 46, 47.

Payment. Upon issue, payment at the day; payment before or after the day, is no Evidence. More 47. but upon Nil debet, it is good Evidence, because it proves the issue.

Covin. Upon issue, Assets or no Assets, or seised, or not seised, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence, by the other, but not if the issue be infeoffed, or not infeoffed, for it is a Feoffment tiel quel, though made by Covin. li. 5. 60. Hob. 72.

Doomesday-book. The Book of Doomesday brought in Court, is good Evidence to prove the Land, to be ancient Demesne. Hob. 188.

Attaint. In Attaint, the Plaintiff shall not give more evidence, nor examine more Witnesses, than was before, but the Defendant may. Dyer 212.

Court-Rolls for Copy-holders. Copies of the Court-Rolls, are the only evidence for Copy-holders, for (as Littleton, Sect. 75. tells you) they are called Tenants by Copy of Court-Roll, because they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls.

Rolls. But Cook explains the Text, and ſays, This is to be underſtood of Evidences of Alienation, for a Releaſe of a Right by Deed. A Copy-holder (that cometh in by way of admittance) may have, and that is ſufficient to extinguiſh the Right of the Copy-holder which he that maketh the Releaſe had.

In Actions upon the Caſe, Treſpaſs, Battery, or falſe impriſonment againſt any Juſtice of Peace, Mayor, or Bayliff of City, or Town Corporate, Headborough, Portreve, Conſtable, Tythingman, Collector of Subſidy or Fifteen, in any of his Majeſties Courts at Weſtminſt. or elſewhere, concerning any thing done by any of them, by reaſon of any of their Offices aforeſaid, and all other in their ayd or aſſiſtance, or by their Commandment, &c. They may plead the general iſſue, and give the ſpecial matter of their excuſe, or Juſtification in Evidence. 7 Jac. cap. 5. Special Evidence upon the general iſſue, by whom.

General acts of Parliament, may be given in Evidence, and need not be pleaded; and ſo may general Pardons given by Parliament, if they be without Exceptions; But commonly advantage of the Act is given by the Act it ſelf to the offender, without pleading it, as by the late (moſt truly ſo called) general act of Indempnity, every perſon thereby pardoned, may plead the gene- Statutes. Pardons.

general ſiſue, and give the act in evidence, for his diſcharge, which are general, and which particular Statutes, ſee lib. 4. 76.

Trover. Upon not guilty in Trover, the Defendant may give in Evidence, that the goods were pawned to him for 10 l. That he diſtrained them for Rent, or damage feaſant, That as Sheriff, he levied them upon Execution, or that he took them, as Tythes ſevered. Cro. 1 part. 157. 3 part. 435. Hob. 187. A demand and denial of the goods is evidence of a converſion.

If there be two Trespaſſes, and the Defendant peads a Juſtification; if the Plaintiff replies *de injuria ſua propria, &c.* he cannot give in Evidence a Treſpaſs at another time; But he ſhould have replyed, that at another time, in the ſame day of his Count, the Defendant did the other Treſpaſs, *&c.* to which the Defendant may plead another Juſtification, but the Plaintiff cannot then plead a Treſpaſs at another time, but muſt conclude *Sans tiel cauſe, &c. vide Apres.*

If there be two Batteries between Plaintiff and Defendant, at divers times, the Plaintiff is bound to prove the Battery made the ſame day in the Declaration, and ſhall not be admitted to give another day in evidence, as the caſe may be. As in Battery, the Defendant pleaded, Son aſſault Demeſne, and the Plaintiff replyed, de injuria ſua propria abſque tali ſua, and in evidence, the Defendant maintained, that the Plaintiff beat him the day mentioned in the Declaration, and in the ſame place; which the Plaintiff perceiving, he gave in evidence, that the battery was made another day and place, to which

the

the Defendant demurred, upon the difference aforesaid. Brownlow 1 part 233. 19 H. 6. 47. But upon not guilty, it is otherwise, though there be never so many Batteries between the parties. Littleton, Sect. 485.

Prohibition for suing for Tythes in Bocking Park in Essex, and surmised, that the Lands were parcel of the possessions of the Priory of Christs Church in Canterbury, and the said Prior and his Predecessors had held it discharged of Tythes tempore dissolutionis, and pleaded the Statute of 31 H. 8. The Defendant pleads, that the Prior and his Predecessors, did not hold them discharged, and upon issue joyned thereon, the evidence was that the Prior, or his Predecessors, time out of mind, &c. never paid Tythes; but no cause was shewn, either by unity of possession, real composition, or other cause to shew it discharged: Cook said it was no evidence; for it is a prescription in non decimando, Curia contra; For a spiritual man may prescribe in non decimando, and by the Statute of 31 H. 8. he shall hold it discharged, as the Prior held it; and if he held it discharged, non refert, by what means; for it shall be intended by lawful means, and the Jury afterwards found for the Plaintiff. Cro. 3. part 2. 6.

A non decimando.

In *nil debet*, upon the Statute for tythes a Lay person cannot give a *Non decimando* in evidence, so may the King, and any other spiritual persons. li. 2 B. of *Winchesters* Case.

Indebitatus assumpsit.

Upon non assumpsit, in a general Indebitatus assumpsit, the Defendant may give in evidence, payment at any time, before the Action brought, but upon a special promise to pay money, &c. it is otherwise, Causa patet; for in the first case, if there be no Debt, the Law will infer no promise.

A Church-Book is no evidence. *Brownlow* 1. *part* 207.. Postea 26. Assise. pl. 4.

If a Church-book, or any thing else is given in evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the Postea. Brownlow 1 part. 207. But the Court may order a new Tryal, upon cause shewed, as for excessive damages, &c.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

But here I recollect my self, and consider that this Chapter is of greatest use to our Circuit practiser, and therefore I shall go no further in scatter'd instances, but digest my further Collections into a method more beneficial, which may be improved by any Practiser, as other matter shall occur.

Action of the Case.

Quare defendens Crimen felonix ei imposuit, &c. the Plaintiff cannot give in evidence words only, but Acts, as arresting, charging or

or conventing him before Justice of Peace for felony. Sanders verſ. Edwards Mich. 14 Car. 2. B. R.

If any action ariſes on requeſt, as in Trover or ſpecial promiſe, the Statute of limitation goes only to the requeſt. Juy's caſe. Mich. 1653. C. B. v. 1 Cro. 139.

Declaration for words ſpoken in the preſence of A, B. and others, in evidence it ſufficeth that they were ſpoken in the preſence of others only, Wingfield and Coote, Lent Aſſiſes Norf. 1662. per Hale Ch. Baron.

In Indebitatus for carrying of Herrings, the evidence was, he was a Porter at Yarmouth, and when Herring-Ships came home, he went (of his own head) and carried up to the Defendants houſe, with other Porters, ſo many Herrings, and Good, by Twiſden Judge of Aſſiſe Norf. Summer 1662. Jermin verſ. Lucas.

In action for hindring to ſit in a Pew claimed by preſcription, repaired, &c. ought to be given in evidence; and one may preſcribe to ſit in the uppermoſt ſeat in a Pew. Buckſton and Bateman, Mich. 14 Car. 2. B. R.

In action for executing an illegal Warrant, &c. It's good evidence to prove the Just. of Peace acted as such without shewing his Commission, so on the Statute of Hue and Cry. Constables case. Norf. Lent Assises per Hale Chief Baron.

Action for stopping up lights, &c. One had a piece of Ground and builds an house on part, and Leases it, then he sells the other part of the Ground to one who builds on it, and stops up the lights of the first house, the Lessee has a good action. But if two owe two pieces of Ground, and one builds, the other may also build and stop up his lights. Palmer vers. Fleshers Mich. 15 Car. 2. B. R.

If a Master always gives his servant money to buy his Markets with, it is good evidence to discharge the Master in an action brought against him for goods taken up on Trust, by that servant. Per Glyn Ch. Just. Mich. 1658. at Guild-Hall, Sr. Tho. Rouses case.

A water course runs through my Ground to the Grounds of J. S. where is a pit that time out of mind used to be filled with that water. I may stop the water in my Ground, and use it as I will, so I do not turn the course another way, but when I have done with

with it, let it fall into its own course. Per St. John Ch. Just. C. B. Suff. Summer Assises, 1657. Smart and Tyssead.

Action for words, You forswore your self in your answer in Chancery. Defendant justifies. Plaintiff replies de Injuriâ suâ propriâ absque tali causa, per Hale Summer Assise, Suff. It's a good replication, and a small mistake in an answer shall not convict of perjury, for the Councel may mistake or his Clerk.

Action for not scouring a Ditch, by which the water overflowed his Land, &c. and declare quod quidam Rivus run there, &c. Upon evidence it appeared only a Land-flood, and good by name of Rivus, though it be dry great part of the year; and it was held the best pleading of the course of this River to put a place from whence it comes, & so to the Plaintiffs Land, without mentioning mean places by which it passes, which may be many, and must be proved if laid, per Whitfield 1641. York, Clayton 96.

Souldiers lying in an Inn 14 days, are guests within the Custom of England, Harlands Case, per Whitfield 1647.

The Plaintiff in action of the case intitles himself by prescription, to a Fold course for Sheep upon all the Lands in such a Field

on

on Mich. day, and ſo to Lady day, the Lands being unſown, and for that the Defendant put on Sheep, &c. before Mich. day and after, and thereby fed the grounds, &c. the Plaintiff could not take ſo good feed. actio inde.

1. The owner may put on Sheep and feed his own grounds before Mich. unleſs a Cuſtom be to the contrary, which ought to be laid in the declaration, Contrà of a ſtranger.

2. It appearing that part of the Lands, &c. had been the Lands of the Plaintiff who was Lord of the Mannor, and preſcribed as ſuch, and there being no exception of thoſe Lands in the preſcription, the Plaintiff was nonſuit, for as to thoſe Lands the preſcription was gone by unity of poſſeſſion. Per Hale Ch. Baron, Norf. Summer Aſſiſes 1668. Branthwait verſ. Hunt.

Aſſumpſit.

In Indebitatus, covenant to pay, is no evidence, 2 Cro. 505. nor money due for rent by ſpecialty, or on Record. Hob. 284. Hutt. 35.

But an account ſtated for rent and other things, is good Evidence.

In Indebitat. for money, &c. delivery of Corn or other matter in ſatisfaction, is good

good evidence, Contr. in a ſpecial Action of the caſe on Aſſumpſit.

Indebit. lies not for money won at Dice, Wiche's Caſe Hill. 14, 15 Car. 2. B. R.

If a promiſe be made to pay at a day certain, and the day is paſt, the Plaintiff may declare to pay on requeſt: ſo if he declare on payment at a day certain, & give in evidence, a promiſe on requeſt, i. e. when it's created on account which gives the duty, for there the time is ex abundanti; but where the action is founded on the Contract, otherwiſe, for there the evidence muſt purſue the Contract. Hill. 1650. B. R. Child's caſe.

Promiſe to reſtore a Horſe hired for a Journey, if the Horſe dies in the Journey without the Riders default, his promiſe binds not. Liſle's caſe, cited in Matraver's caſe Trin. 1651. B. R.

One brings an Aſſumpſit for 20 l. and gives in evidence a promiſe if two would ſurrender to pay them 20 l. a piece, good. Mich. 1655. B. R. Thomas and Gerey.

Indebit. for 50 l. brought by Edgar againſt Chetham Clerk. The evidence was, T. was indebted to Edgar in 50 l. Chetham deſires Edgar to let him take the 50 l. of T. and he would give Edgar a Bill of Exchange

to

to receive ſo much at London: accordingly T. promiſes to pay Chetham the money, which promiſe he accepted, and gave a Bill of Exchange to Edgar; after T. became inſolvent, then Chetham prohibits the payment of his Bill, whereupon this action is brought. Per Wadh. Wyndham Juſt. Aſſ. Norf. Summer 1663. the action lies, for Chetham having accepted the promiſe of T. and given a Bill, &c. is now become a Debtor to Edgar until his Bill be paid, though he never receives the money of Thompſon.

In Indebitat. It is good evidence againſt the Father, that Phyſick was delivered to his Daughter at his requeſt, Stone-houſe verſ. Bodvill Hill. 14 Car. 2. B. R.

One promiſes a Bayliff that if he would let one arreſted be in his houſe that night, he would deliver him in the morning, it's a good promiſe, and the Bayliff or the Plaintiff may bring the action. Benſon verſ. French Paſch. 15 Car. 2. B. R.

Indebitat. The caſe was, the Plaintiff ſold 60 Comb of Rye to the Defendant at 14 s. per Comb, to be delivered before Mich. the Plaintiff delivered 30 Comb before the time, and brought this action for the money for it, and good, though it was agreed the money to be paid on the delivery of the laſt Rye. per Hale Ch. Baron. 1. Though

1. Though the agreement is intire, yet the ſeveral deliveries make ſeveral contracts.

2. Though the payment was to be on the laſt delivery, yet a time being ſet for delivery, it's intended to be paid when the delivery ſhould have been.

3. The time being paſt, it's now a duty, and ſo Indebitatus lies.

4. The Defendant has his remedy for not delivering the reſidue. Baker verſ. Sutton. Lent Aſſiſe Norf. 1662.

Indebitat. lies for a portion, after the Joynture ſetled, ſo for 1000 l. on promiſe of ſo much for every Horſe-ſhoo nail, but the Jury may mitigate Damages. ib.

A promiſe to marry B. within 3 Months, within a Fortnight after they meet, and the party promiſes again to marry her within 3 Weeks, this laſt promiſe is no diſcharge of the former, being all within the time of 3 Months, but had the laſt promiſe been to marry her within ſome other time after the 3 Months, it had diſcharged the former. Hite verſ. Chaplin. Paſch. 1658. B. R.

Indebitatus by one, Defendant gives evidence that another was partner with the

Plaintiff, at the delivery of the Wares, Plaintiff Nonsuit. Franklin vers. Walker, Norf. Lent Assise 1667. per Moreton. Contr. in Trespass, for there Joint-tenancy must be pleaded.

Indebitatus for 9 l. Defendant pleaded non assumpsit infra sex annos, issue inde, the Plaintiff proved a Debt of 9 l. due 10 years before, and an acknowledgement of the Debt within 6 years, and an offer to pay 5 l. for the whole.

Per Hale, The Plaintiff nonsuit, for the acknowledgement of the Debt is no more than is done by the Plea, but there must be a new promise of the Debt within 6 years to make the action hold, and here the promise or offer to pay 5 l. gives no action for the 9. l. Bass. vers. Smith Suff. Sommer Assise 1668.

Debt.

Debt on a Bond to perform Covenants, to deliver possession at the Terms end to the Lessor or his Assignes; breach was assign'd in not delivery to two purchasors, demand being made by both, and issue joyn'd thereon, in evidence demand by one is good. 2 Cro. 475.

Debt

Debt on Bond to perform an award, ita quod the award be delivered to the parties, in evidence, delivery proved to the Wife is sufficient for the Jury to presume the delivery to the party himself, per Hale Norf. Summer Assise 1665. Trice and Prat.

At the same Assises per Moreton Just. delivery to the parties Son is good evidence, Violet and Cook.

Debt against an Heir, &c. riens per descent, &c. a Feoffment given in evidence made before the action, that it was fraudulent may be given in evidence, though not pleaded, 5 Rep. Co. Gaithes case Hob. 72.

Debt against Executor, who pleaded ne unques, &c. Plaintiff replied that he Administred as Executor, and gave in evidence Administration granted to him, by which he Administred, Good. Dyer 305.

In Debt against Executors, and plene Administravit pleaded, the Defendant cannot give in evidence a Bond satisfied where the Executor and Testator were obligors, per Coventry Lord Keeper 33 Eliz. Perkins verf. Perkins.

In Debt for Tythes, Modus to a Vicar is good against the Parson, and so is a

Modus to a Parish Clerk, per Moreton Just, Lent Cambr. 1667. Barber versus Cosier.

In Debt against Executor de son tort, who pleads ne unques, &c. It is sufficient to charge him, by proving he hath administred of never so little value. Clayton 6.

Against Executor de son tort, who pleaded fully administred, the evidence was, the Intestate made a Bill of Sale of his goods to the Defendant, who was bound with him in a Bond as surety, for his Counter-security, but the goods remained in the Intestates possession during his life, for some few hours, ruled a fraudulent Deed by Barkley Just. at York. 11 Car. Legard and Linley. Clayton 39. quære.

If the Defendant pleads *plenè*, &c. pretor judgements, *&c.* The Plaintiff must prove Assets above the sum of those Judgements. *Huntington*, by Judge *Windham* 33 Car. 2.

Debt against Administrator, who pleaded plene, &c. and gave in evidence Judgements, and good without pleading, per Henden. 1638. York. Clayton 65. Quære, for if Judgements be kept on foot by fraud, and given in evidence, how can a Creditor who sues for a just Debt, be prepared to detect this fraud. And note, in Scire facias against an Executor on Judgement per Testator, the Defendant pleaded fully, administred generally, and the Plaintiff demurred specially, and Sir William Jones Sollictor general moved to amend the Plea, and Hale Ch. Just. thought he ought to plead specially,

ly, how fully administred. Bradford verſ. Hutchinſon. H. 25, 26 Car. 2. B. R.

Debt for Rent on a Leaſe, the evidence to prove the Leaſe was, that the Plaintiff leaſed a Houſe to the Defendant at a Rent, but no time mention'd, and it was agreed at the ſame time, that the Leſſee was not to leave it without half a years warning, per Hale, Norf. Summer Aſſiſe 1668. It's a Leaſe at will, & the leaving on half a years warning, is but a Collateral agreement, and no part of the demiſe.

Ejectment.

The Plaintiff Counts of a joint Leaſe made by A. and B. in evidence it appeared that A. B. and C. were Joynt-tenants, that C. Leaſed to B. and that A. and B. Leaſed to the Plaintiff, by 3. Juſt. againſt two it's good. 2 Cro. Jurdanes caſe. fo. 83.

Count of a joynt Leaſe made by two, in evidence it appears they were Tenants in Common, by 3 Juſt. againſt one, it's not good. 2 Cro. 166. Mantles Caſe.

Count of a Leaſe by Husband, evidence was a Leaſe by Husband and Wife with Letter of Attorney to make livery, and 'tis made in name of both, by 3 Juſt. againſt one it's good, for Livery as to the

Feme

Feme was void. 2. Cro. Gardners case.

Of a Lease made 5. May 10 Regis habendum from Lady-day last past for 21 years Extunc prox. sequent. In evidence a Lease of 5 May 10. Regis habendum, from Lady-day last past for 21 years next following the date of the said Indenture, adjudged good and affirmed in Error. Hob. 19.

Ejectment of a Rectory, evidence of the taking of Tythes only, and not Entry into the Glebe, the Plaintiff was nonsuit. Latch. 62. Hems and Stroud.

Ejectment of a Lease to A. of Lands in the possession of three Tenants for years, delivered to I. S. as an Escrow with Letter of Attorney, to enter into all, and then to deliver his Deed, &c. evidence, that the Attorney entred upon one Lessee in name of all, and delivered the Deed, &c. Per Jones Just. It's good enough, for where the Freehold is in one, his Entry into one Lessee for years in name of all the rest is good. Latch. 71. Dame Argells case.

Where one declares on a fictitious Lease to A. for three years, and within the same time declares of another fictitious Lease to B. of the same Lands, the last is not good. For Trespass for the mean profits must be brought in the first Lessees name, ut dicitur.

Ejectment

Ejectment of Tythes, a Lease for life of Tythes is good, if there be Church or Church-yard to make Livery in, resolved in Tryal at Bar, Wheeler verſ. Hancher Hill. 14, 15 Car. 2. B. R. v. Jones rep. 321, 322.

Entry and Claym made upon the Land within 5 years after the death of the Baron of the Countess of Peterborough to avoid a fine, she being issue in tayle, proved by one Witness, and allowed at a Tryal at Bar, B. R. Mich. 15 Car. 2. Floyd and Pollard.

Custom of Copyholders in extream is to surrender into one Tenants hands, in the presence of credible Witnesses. A surrender was made accordingly, but presented to be done to another Tenant, yet being proved to be done to a Tenant, it was holden by Wadh. Wyndham Just. to be good, and by him, a Glove or a Turfe, is a Rod to give seisin by, Mayo's case. Norf. Summer Assises 1663.

A Will under which Title to Land is made, must be shown it self, and the Probate is not sufficient. Contr. if it were on a Circumstance, or as inducement, or that the Will remain in Chancery, or other Court by

by ſpecial order of ſuch Court. Eden verſ. Chalk-hill. Mich. 13 Car. 2. B. R.

Alſo Inrollment of a Deed, which needs no Inrollment, is no evidence. ib.

The iſſue was fine uncertain, or certain 2 years Rent and no more, the evidence was of admittances on ſurrenders uncertain, but all under 2 years Rent. Per Williams Juſt. you ought to produce fines on deſcent, and fines paid above two years Rent. 2 Bulſt. 32. Allen verſ. Abraham.

A leaſe was made by parol and agreed to be put in Writing, and Indentures beſpoke, but being held for Ten years, and no Indentures executed, it was ruled for a leaſe parol. Per Barkley Juſt. 13 Car. 1. York, Clayton 53.

By Juſt. Berkley (1638. York, Hedges cont. Clayton 57) a Will under Seal, proved examined by the original, was allowed good evidence. Quære, I think the practice againſt it.

A Leaſe and Releaſe were given in evidence to entitle the Plaintiff, and they both were named hæc Indentura, but were not indented, good, per Hale Ch. Baron, Norf. Summer Aſſiſes 1668. Briant verſ. Trendle.

After

After default (in Ejectment) the Defendant may confess Lease, Entry and ouster, and may give evidence, and have all advantages (except Challenges) and if the Plaintiff becomes nonsuit, any one for the Defendant may pray it be recorded.

Per H. Wyndham Just. Bucks Lent 68 Dr. Crawle's case. Deprivation in spiritual Court for Simony disables from bringing Ejectment, because he can make no Lease, yet quære.

If Mortgagor continues in possession, without provision for that purpose in the Deed, he is Tenant at Will, and if he levies a Fine it's no disseisin by him continuing in possession still, because after the Will determin'd he is Tenant at sufferance. Per Hale Ch. Baron Bedford Summer Ass. 1669.

Declaration on a Lease made 14 Jan. 30. Eliz. evidence of a Lease Sealed 13 Jan. good, for if it was a Lease 13. it was a Lease made 14. 4. Leon 14.

Feoffments of 40 years standing, and possession going accordingly, you need not prove Livery, it may be intended per Jury. Roll. rep. 132.

The Common Rock on which so many

have split, is laying the Lease to be à die datus, and the Entry the same day, which is a disseisin, not purged by the Commencement of the Lease, for where an interest passes [à] is exclusive, and so the entry the same day, is before the Lease was to Commence, & is a disseisin, but in cases of Obligation where no interest passes, it is contra, quod nota.

Tresпass.

Count of Tresпass done in one acre, evidence of Tresпass done but in half that acre, good. 2 Cro. Winkworths Case.

The Lady Hatton brought Tresпass for breaking her Close, and taking away her Horse, &c. against two Defendants, they plead Not guilty, as to the taking of [Her] Horse, as to the rest, they say that the Horse of one of the Defndants was in the Close, &c. and they took him out doing as little damage as they could, quæ est eadem, &c. The Plaintiff replies de injuriâ suâ propriâ, &c.

The evidence was, that the Plaintiff as Lady of the Mannor took the Horse as an Estray, and it was Cryed and Marked, &c. that the Defendants refused to pay for the meat, and took him away, before the year and a day was out.

1. Per Wadh. Wyndham Juſt. d' aſſize, A Lord may detain an Eſtray for meat, yet no Treſpaſs lies if the owner takes him, but an action of the Caſe lies for the meat.

2. If the action had been brought againſt the ſervant only, he muſt juſtifie, &c. But being brought againſt Maſter and Servant, this joynt-juſtification is good.

Cambr. Summer Aſſiſes 1667. Lady Hatton againſt Cotes and al.

In Treſpaſs, the evidence for the Defendant was, that the Defendant had a Barn, and purſchaſed a way over the Plaintiffs Land to that Barn, after the Defendant bought other Lands lying contiguous to that Barn on the one ſide and to a Haven on the other ſide, and carried Carriages by that way to the Barn, and through it over his own new purchaſed Land to the Haven. Per Hale Ch. Baron. If I purchaſe a general way to ſuch a place, I may go from thence on my own ground whither I pleaſe, though I purchaſe the ground after the way purchaſed. Summer Aſſiſes Norf. 1665. Heynſworth verſ. Bird.

Treſpaſs was brought againſt many, by a School-miſtreſs, for taking away a child (her Scholar) with a Scarfe of the Miſtreſſes,

ſtreſſes, per Keeling Ch. Juſt. In Treſpaſs for taking [things] all are principals that are preſent and conſenting, Contra, in taking [perſons] and this action lies not by the Miſtreſs for the child, but for the Scarfe only. Lent Norf. Aſſ. 1663. Mary Coopers caſe.

Treſpaſs lies for Leſſee in Ejectment on a fictitious Leaſe to recover mean profits during the continuance of that Leaſe mentioned on Record: And the Recovery ſhall maintain it. Otherwiſe if brought by the Leſſor, for he is no party to the action.

Treſpaſs lies not for pulling down a Pew in a Church faſtned to a pillar with a Chain. Contra, had it been fixed by nails driven into the pillar, per Glyn Ch. Juſt. Trevors caſe,

Treſpaſs quare fregit liberam Warrenam ſuam, and took his Conies. In evidence it appeared that the Plaintiff had liberty of chaſe in the place, which though it includes Warren; yet a general Treſpaſs lies not, but an action of the caſe. E. of Arundels caſe, Paſch. 1658. B. R.

Per Earl Sergeant, if Beaſts be impounded, and the Key loſt, the Officer by Replevin may break the pound, and deliver the Cattle,

Cattle, per Stat. Marlebridge 52 H. 3. 21.

Tenants in Common muſt joyn in Treſpaſs done againſt them, ſo Abowzy, Lead and Lamſteads caſe, 7 Car. B. R. cited by Finch in Argument. Dz Tenant in Common ſurviving ſhall have Treſpaſs.

In Treſpaſs, the Defendant ſets forth a conditional Feoffment foz payment of money at ſuch a day and place, and that he paid it accozdingly; iſſue joyned on the payment at the day and place, evidence of payment before the day is not good. Contra, had the ſpecial matter been pleaded with acceptance. More 47.

In Treſpaſs with Continuando to recover mean profits, an Entry and poſſeſſion of the Land before the Treſpaſs muſt be proved, and alſo another Entry after the Treſpaſs.

In Treſpaſs, the Defendant preſcribes to dig in the Common foz Clay, to repair antient houſes holden of that Mannoz, and good. Berney verſ. Stafford Norf. Lent Aſſiſes 1667.

In Treſpaſs they were at iſſue on Not Guilty, and at the Aſſiſes the Defendant left his former plea, and pleaded an accozd with ſatisfaction, the Judge would have

have had it replied to and tryed presently, but the Councel refused, whereupon the Jury was sworn, and the Plaintiff nonsuited. Bedford Assises Lent 1667. Green vers. Reynolds. But this was contrary to the opinion of Sir Orlando Bridgeman, at the same Assises, and Contr. to 10 H. 7. 21. and 1 Bul. 92.

Trespass lies by Recoveror in Erroneous Judgement for a mean Trespass, because the Plaintiff in Writ of Error recovers all mean profits, and the Law by fiction of relation will not make a wrong doer unpunishable. 13. rep. Co. 22. but Contra, where Act of Parliament restores, &c.

Trespass for assault and wounding in Suff. the Defendant as to vi & armis non Cul. As to the other justification of molliter Manus, &c. in Norf. and several Tryals. Per Hale Ch. Baron Suff. Ass. Summer 1668. the vi & armis can't be tryed till the other be tryed. Contr. If the first issue of non Cul. was as to the wounding: and by him evidence of Livery of seisin, generally shall be intended for life only.

The Hogs of B. were put into the yard of A. and broke into the Land of C. and did Trespass, action lies against A. though the servant of B. did look to them and serve them,

them, by which the owner had the ſpecial poſſeſſion of them. So if Agiſted Cattle do Treſpaſs, the Agiſtor ſhall anſwer. Dawtry verſ. Huggins, Clayton 33. per Barkley. 11 Car. York.

A. by Indent. of uſes raiſed an Eſtate to B. in Fee, who regrants Turbary to A. by another Deed, and after A. levies a fine to confirm the Eſtate and uſes abovеſaid declared, this doth not touch the Turbary, per Vernon, 11 Car. York, Clayton 42.

Any one imployed by an Officer, is an Officer within 7 Jac. 5. to plead general iſſue, and give the ſpecial matter in evidence. Clayton 54.

Preſcription to tether Equos & Boves upon ſuch a balk, &c. Mares and Cowes, good evidence within that preſcription. Per Barkley Clayton 54.

Per Hale, A Corporation may bargain and ſell, though, it has been thought an uſe upon uſe, they being ſeiſed to the uſe of their houſe. But I think it rather a truſt than an uſe.

If a Juſt. of P. ſend his Warrant to I. S. (who is no Officer) to bring one before him, if I. S. be no Officer, he is not bound to execute it, yet if he does execute it, it's good, and he may execute it in any part of the County. And ſo a Conſtable of one Town may

may execute a Warrant in any other Town in the same County, and any such Warrant is as large as the Justices Commission is, per Hale Norf. Summer Assises 1668. Woongries case.

In Tresspas against one for Gleaning on his ground, per Hale Norf. Sum. Assises 1668. The Law gives licence to the poor to glean, &c. by the general Custom of England, but the licence must be pleaded specially, and can't be given in evidence on non Cul.

Trover.

The Citizens of London gave in evidence their Custom to take Toll. Jones 240.

In Trover, for an Horse proved of 15 l. value, the Jury gave but 3 l. damages, upon mistake, they thinking that the Plaintiff had his Horse again.

Per Wadh. Wyndham; if the Jury had not been gone, they should have mended their Verdict; but a new action of Trover lies for damages for the Horse, in which the Jury shall prove the 3 l. given was only for the conversion, not the value of the Horse; and by him, Trover lies for goods in the Plaintiffs possession, to recover damages for the conversion only. Tyndal vers. Jolliffe Norf. Lent Assises 1660.

In

In Trover by Administrator where the conversion was in the time of the Intestate, the Plaintiff must shew the Letters of Administration, Contr. where the conversion was after his death. Per Hale Norf. Sum. Ass. 1660.

If an Estray be claimed within the year and the day, &c. and the Lord refuses to deliver it; Trover lies, though the keeping is not paid for, and the Lord sayes he detains for the same, and the Lord can't detain for the meat, &c. but must bring his action. Per Moreton Just. Lent Norf. 1667. Bond vers. Paston, Quære, & vide Dent tit. Trespass, per Wyndham Contr. and I think is Law.

At the same Assises, Daniel vers. Berney, by Moreton Just. Proclamation may be made of an Estray by any person, and it is not necessary, that it should be made by the Bell-man or any other Officer. Vide Co. Entries 170. Barber vers. Fawcet, In Trover, issue was joyned, on tender of amends for keeping, &c. and Verdict pro Plaintiff and judgement.

Note, I find precedents, that in Trover, the matter of an Estray may be pleaded specially, or given in evidence on Not guilty.

Oats were taken from the owner, and carried to a Miller to make into Oat-meal, and before it was done, the owner prohibits the Miller, &c. and demanded the Oats, who, notwithstanding, made them into Oate-meal: Per Barkely it's a conversion in the Miller. 1638. Clayton 57. Holsworth's case.

On non Cul. The Defendant gave in evidence, a seisure for goods Foreign bought and Foreign sold: Per Custom of Lynn Norf. good per Hale, Norf. Sum. Ass. 1668. Harwich vers. Twells.

A man lends his Horse to a special purpose, the Bailee abuses the Horse, and over works him, then the lender takes the Horse again: Per Hugh Wyndham Just. Lent Assises Bucks. Trover lies not, Constables case.

Dower.

In Dower, the issue was ne unque seisie que Dower, and for the Plaintiff, a Feoffment in Fee was given in evidence to the Husband, the Defendant would have given in evidence, a seisin in tayle with a discontinuance, and then the Feoffment, &c. and so a remitter, but it ought to be pleaded per Cur. Dyer. 41.

If an Heir Mortgage for years and then assigne Dower legally i. e. a 3. part of the whole, the assignment shall bind the Mortgagee; Cont. if the assignment be illegal, as of one whole Mannor when there were three Mannors; that being not as the Law would have done it. And if a disseisor assigne a legal Dower, it's good: But if the Heir Mortgage in Fee, and then assigne, &c. legally, &c. that is not good, because the whole Freehold was out of him at the time of assignment: Per Hugh Wyndham Just. Bucks Lent Ass. 1668.

Account.

Against B. as receiver of two 30 l. and as Bayliff for receiving his Rents for several years, not saying any certain sum of Rents: Per Earl Sergeant, the proper way is to find quod Computet, as to what is certain in the declaration and so proved, as the money was, but not to the Rents, and so he said was the opinion of Hale. But per Moreton Just. the Verdict shall be general, and it may be both ways. Saye's case Norf. Lent Assises 1667.

Thus far I have made an Essay of a method, to be further built upon by our Practiser, and have given some cases, not in Print, and (it may be) useful. I shall add some other cases, not so proper for heads except that of

[Evidence] with which I shall conclude this Chapter.

Evidence.

Inspection of a Deed Inrolled may be given in evidence, Contr. of a bare Deed not Inrolled, or of a Deed that needs no Inrollment. Pasch. 1655. B. R. Goodson's case.

A Deed to Lead the uses of a fine was Inrolled on the acknowledgement of but one of the parties to it, & was allowed by Glyn Ch. Just. in evidence, as Roll Ch. Just. had done before him, though no binding evidence, Turber vers. Maddison Pasch. 1655. B. R. Sty. 462

An office found at a death, &c. may be given in evidence.

A Verdict against one, under whom either Plaintiff or Defendant claims, may be given in evidence against the party so claiming, cont. If neither claim under it. Duke and Ventres Mich. 1656. B. R.

If an Action be brought on a Statute, which has several provisoes in it, the Defendant may plead,

plead, not guilty, and aid himself by any of the proviſoes in evidence: But if proviſoes be made to that Statute, of which the Defendant may take advantage, he ought to plead it, and not give it in evidence, per Roll. Ch. Juſt. Mich. 1650. B. R. Jones 320. accord.

Jointenancy in treſpaſs cannot be given in evidence; but muſt be pleaded in Abatement. Jones verſus Randal, Hill. 1652. C. B.

Arreſt and Impriſonment to prove a Bankrupt muſt be proved by Record: Newby verſ. Bathurſt Paſch. 1659. B. R. In a Tryal at Barr.

The cuſtome of New-England, to marry by the Magiſtrate in the preſence of a Miniſter, was allowed good by Hale Ch. Juſt. B. R. Trin. 1663. at Guild-Hall, int. Hall & Hall.

The Certificate of the King under his ſign Manual was allowed in Chancery for proof without exception, Hob. 213.

Records, as Patents, Statutes, Judgments, may be given in Evidence, Hob. 227. contr. to Dyer 129.

When

When Records are pleaded, they must be Sub pede Sigilli, Contr. if given in Evidence. Stiles 22. Whites case.

An answer in Chancery, is Evidence against the Defendant himself; but the Bill must be proved. Godb. 326.

Upon a traverse of a Lease parol for years, viz. Absq; hoc quod A. demisit, &c. Nihil habuit in tenementis, may be given in Evidence. Dyer 122.

Shewing a Grant to digg Turfs, is no Evidence against a Prescription for the same, but the Grant being the same with the Prescription, shall be taken as a confirmation. Crew & Vernon, Moore 819. Quære tamen, v. Moore 830. Where a Court of Pipowder is claimed by Prescription and Grant, and good. 2 Cro. 313. Acc.

In Trespass for taking Goods, after Judgment, per confession, non sum informatus, or nil dicit, Property need not be proved to a Writ of inquiry; for it would oppose the first Judgment, Quod quærens recuperet; and the Judges

Judges might have Assessed damages if they would. Yelv. 151. Yet quære, if the Defendant may not disprove property in mitigation of Damages; for the Jury may find no Damages.

A Copy of a Deed, is good Evidence where the Defendant has the deed, and will not produce it, Per Vernon just. Clayton 15. Mod. Rep. 266

A deed of Feoffment without Livery may be given in Evidence as a Release. Per Berkly 11 Car. Clayton 32.

If a Fine be given in Evidence, with five years non clayme, &c. the fine must be shewed with the Proclamations under Seal, and the Chirograph will not serve.

The confession of a party must be taken whole, and not by parts; As if to prove a debt, it be sworn that the Defendant confessed it, but withal he said at the same time, That he paid it, his confession shall be valid as to the payment as well as that he owed it. Per Hale Ch. Just. And so is common practice.

A deed cancelled by practice, was allowed to be read, in Evidence in action under that Deed, the practice being proved. Hetly 138.

Against a Purchasor bona fide, recital in a Deed of money paid is not sufficient, nor acquittance for the money, unless it be of antient standing, and then it shall be presumed.

The Deed to lead the uses of a Fine sur concessit, need not be proved per Testes.

If a deed of Feoffment be shown, but no Livery, possession going with the Deed, is Evidence to a Jury to find Livery.

At Guild Hall Trin. 23 Car. 2. Hale Ch. Just. cited the Case of Sir Paul Pindar, A Levari, &c. was proved by a recital of it in another Record, and Hale and Mainard demurred on the Evidence, and adjudged against them, for this Cause, viz. That it was proved, there was such a Record, that it was filed, that it was taken off the file. But (by him) generally without such proof, the evidence is not

not good, because one Record may recite one that never was.

The Jury are to decide the fact, and evidence is not given but to inform them in their consciences of the truth, for although no evidence is given of either side, yet they may give their verdict of one side or the other. 14 H. 7. 29. And therefore although two witnesses are necessary, where the tryal is by witnesses, as in the Civil Law; Yet they are not of necessity, where the tryal is by Jury. And where witnesses are joyned with the Jury, yet they may be rejected, if they will not agree with the twelve, and the twelve may give their Verdict. Office of the Jury.

The Jury after they are departed from the Barr, may return to hear their evidence of any thing they doubt before the Verdict.

Sur Travers de done in tayle, the witnesses prove; That another made the Done; this doth not warrant the issue. Done in Tayle.

In an action against the Sheriff upon Extortion

 vers. Vic.

the Statute of Extortion, That he took it for Barretée of one who was acquit, is good evidence.

Poſſeſſion. Poſſeſſion is an evidence of right, and he that hath poſſeſſion may diſtrain the Cattle of him that hath no title, for the taking is in reſpect of the poſſeſſion, more than of the title.

Debt for Rent. In debt for Rent upon a Leaſe, and nil debet pleaded, ne unques ſeiſie de terre is good evidence, otherwiſe upon the plea of riens arrere, or levy per diſtreſſe.

Parſon. Parſon or not Parſon, in ſuch iſſue you may give in evidence a reſignation, although it be in another County and Spiritual.

Fait. In riens paſſe per le fait, Not his deed may be given in evidence.

What ought to be proved in evidence. In Treſpaſs, quare clauſ. fregit, with abuttals, all the abuttals and deſcriptions muſt be proved. But if the abuttal be laid North, &c. and it incline North, though not directly, it is ſufficient: & ſic de cæteris.

Upon

Upon this Iſſue, the account given to the Ordinary, ſhall not be given in evidence, nor any reſpect had to it. *Plene administravit.*

Will, The probat is good for the perſonal eſtate, but not to prove a Will in writing of Land by the Statute. What ſhall be given in evidence, and what is good evidence.

Recital of other Grants by Letters Patents, in Letters Patents are ſome evidence, but not fit to be allowed, without ſhewing the former Letters Patents or a copy. But the Jury may find them. Recital in Letters Patents.

The proof of this ſurmiſe in any Court of Record, ſhall not be given in evidence in another action, upon the ſame cuſtome, becauſe the Defendant in the prohibition cannot croſs examine. Surmiſe in a Prohibition.

Depoſitions in the Court Chriſtian, in the Court of the Councel of York touching the title of Land, of which they have not conuſance, or in another Suit againſt him who claimeth not under thoſe parties, by the Commiſſioners upon a Commiſſion of Bankrupt, becauſe the party could not croſs examine: ſhall not be allowed in evidence. Depoſitions.

But a ſentence given in the ſpiritual Court touching Tithes may be given in Evidence in an Action at Common-Law, for this is a judicial act.

Former Tryal. After evidence given, and the Jury ready to give their Verdict; and then the Atturney General will not proceed, but draws a Juror, and brings another information, none of the former Jurors ſhall be admitted to give in evidence, that the Jury were ready to give their Verdict againſt the King in the firſt information, for this ought not to be diſcovered, for ſo no benefit would accrue to the King by his Prerogative to draw a Juror.

What may be given in evidence upon a ſpecial Iſſue. But this may be given in evidence in another action, where the King is not concerned.

Debt for rent. In debt for rent upon non demiſit, that the leſſor riens avoit in the land at the time of the demiſe, may be given in evidence.

Common. Upon an Iſſue of Common appendant, &c. common

common per cauſe de vicinage, cannot be given in evidence.

If the Defendant plead ſon aſſault demeſne in Battery, and the Plaintiff reply, de injuria ſua propria abſq; tali cauſa, And ſo iſſue is joyned, if there was a battery at another day than what the Plaintiff and Defendant have aſſigned, upon the Plaintiff, and another upon the Defendant by the Plaintiff, The Verdict ought to be for the Defendant; for if the Defendant prove any aſſault made upon him by the Plaintiff, this ought to be found for him, although it was at another day than what he hath alledged, for the day is not material: But upon ſuch ſpeciall juſtification the Defendant hath liberty to prove his Plea at any time, and the Plaintiff might have made a new aſſignment at another time, for peradventure there might be ſeveral treſpaſſes at ſeveral times, to which the Defendant may have ſeveral Pleas, and therefore if ſuch manner of pleading ſhould not be allowed, and ſuch evidence, the Defendant could not tell how to help himſelf, nor could know for what Treſpaſs the action is brought. Vide devant hic & apres cap. 13. Son Aſſault demeſne in Battery.

If

Surrender. If the Issue be whether the Kings Tenant by Letters surrendred to the King or not, the accepting of new Letters Patents, which is a surrender in Law, is good evidence.

Non assumpsit. In a special promise to pay 20 l. if the Plaintiff would pay 10 l. &c. and an averment that he paid the 10 l. upon non assumpsit, the Defendant shall not give in evidence that the Plaintiff did not pay the 10 l. neither is the Plaintiff bound to prove it, for the issue is upon the assumpsit, and not upon the payment of the 10 l. which might have been traversed. And although 'twas said that in all actions there is a general issue to be taken, which shall put all the declaration in issue, and that must in this be non assumpsit, or nothing, yet by the advice of all the Justices of Serjeants Inn in Fleetstreet, it was ruled as abovesaid. Mich. 16 Car. B. R. between Holditch and Brodrig. I have been the more particular in this, because I have known Plaintiffs nonsuited in such cases at the Assizes for want of proving the averment: although I must confess I never agreed with the Judge herein that did it. For it is a mistake to say, The Plaintiff must in all cases prove his whole Declaration, if he proves the matter

ter in iſſue, he ought not to be nonſuited. Rolls tit. Tryal. 1681.

Grant per fait. Where it is ſufficient to prove the effect of the Iſſue.

If an Advowſon be pleaded to be granted Per fait, and this iſſue is taken by a ſtranger to the fait, if it be found granted ſans fait, or by another fait, it is good, for the Deed is ſurplus, and the effect of the iſſue is upon the grant not upon the fait.

Dures.

If an Impriſonment by dures at D. be in Iſſue, 'tis not material whether he was ever at D. or not, for the effect of the Iſſue is, if the Deed was made by dures.

Feoffment.

So of a Feoffment pleaded by Deed, a Feoffment without Deed or another Deed is good, for the effect of the Iſſue is upon the Feoffment, not upon the Fait.

Freſh Suit.

In eſcape of a Priſoner, and the Iſſue is, if the Gaoler immediately after the eſcape made freſh ſuit, if the Priſoner hath eſcaped a day and night before the Goaler knew it, and then he makes freſh ſuit, it is ſufficient to prove the effect

effect of the issue, for convenient pursuit is immediate fresh suit in Law.

Non demisit modo & forma.

If in pleading an Indenture of demise you mistake the rectal, and the issue is non demisit modo & forma; The mistake shall not hurt, for the effect of the Issue is upon the demise.

What thing may be given in evidence upon the general Issue. Tresp. Batt.

If a man plead not guilty, he cannot give in evidence a matter justifiable, which shall be a confession of the act, for this is contrary to the issue. As son assault demesn in Battery, upon Not guilty: but upon Not guilty, in Trespas for beating ones Servant, per quod servitium amisit, you may give in evidence that the Plaintiff did not lose his service by the Battery.

Wast.

Nor upon nul wast fait, can he say, sufficientment repair devant le brief purchase.

Servant.

If my servant without my consent put my Cattle in the Land of another, I may plead Not guilty, and give this matter in evidence; for by puting the Cattle in, the servant has gained a property.

Information.

Upon Not guilty, he may give in evidence a discharge by a Proviso in the same Stat. for thereby he is Not guilty, Contra formam Statuti, but not a discharge by another Statute.

Upon

Upon non habuit ſeu tenuit ad firmam contr. formam Statuti, the Parſon may ſay, he took the Farm for maintenance of his houſe according to the Proviſo in debt upon the Stat. 21. H. 8.

But upon the Stat. 5 E. 6. for ingroſſing upon Not guilty, 'tis ſaid, that the Defendant cannot give in evidence a licence according to the Proviſo of the Stat. ſ. d quære rationem.

Upon ne unque ſon Receivor, &c. the Defendant cannot ſay that he paid the money according to directions, &c. Accompt.

In a Scire facias againſt Terrtenants and a Feoffment pleaded before the judgement abſque hoc that he was ſeiſed tempore Judicii, and iſſue upon the ſeiſin, that the Feoffment was fraudulent, to defraud the judgement, may be given in evidence; but otherwiſe if the iſſue had been upon the Feoffment. Seiſin Feoffment.

So upon reins per diſcent, by an Heir in debt upon an obligation, that the Defendant aliened the Aſſets by fraud and Riens per diſcent.

tobin, and so void by the Stat. of 13 El. may be given in evidence, because these are the general issues.

Parcel. In Trespass for taking a stack of Corn, the evidence may be of part, and the Verdict as to 4 Combs or Bushels, Guilty, and as to the rest Not Guilty.

Plene administravit. Upon this plea the Executor may give in evidence a retainer for a debt due to himself, of as high a nature: or paiment of debts with his own mony, and that he kept goods of the Testator in lieu, for this alters the property.

What evidence the Jury may have with them. They can have nothing but what is delivered to them in Court, and given in evidence by the party in Court, if an exemplification come out of Chancery of witnesses examined there upon Oath who are dead, the Jury shall have this with them; but if the exemplification comprehend some Witnesses alive and some dead, they shall not have it with them. Exemplications.

Pedegree. Neither shall they have any Pedegree drawn by a Herauld at Arms, for it is no evidence but only information for direction. What Evidence the Jury may have with them, see the 14. Chapter.

If

If a man makes a Feoffment and afterwards makes another, with covenants that he was ſeiſed, &c. and afterwards an iſſue is taken upon the firſt Feoffment, the Feoffee ſhall not be a Witneſs. Who may be witneſſes. Not perſons intereſted.

In an information for Uſury, the party ſhall not be a Witneſs, becauſe he would thereby avoid his own Bonds, &c. and be teſtis in propria cauſa. Uſury.

Three men ſwear an Arbitrement, in three ſeveral actions againſt them upon the Statute 5 Eliz. of perjury, each of them may be a Witneſs for the other; but in an Indictment of perjury, upon 5 Eliz. the party grieved ſhall not be a Witneſs, for he is to have 20. l. Perjury.

Common experience tells us upon an Indictment for Battery, &c. the party grieved may be a Witneſs, becauſe 'tis only for the King.

In an action againſt the Hundred upon the Statute of Winton, &c. the Leſſor living out of the Hundred may be a Witneſs, for 'tis not reaſon that he and Hundred.

his Lessee being an inhabitant should be both charged: If the Servant be robbed of the Masters money, the Master may be a Witness to prove the delivery of the money to the Servant before the Robbery. Rolls tit. Tryal 686.

Proceedings in Ecclesiastical Courts.

A thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in evidence to Juries, for the Courts of Common Law are not to be guided by their proceedings. Mich. 22 Car. B. R.

Matter in Law.

Matter in Law is not to be given in evidence, for the Jury are only to try matters of fact.

Ancient Writings.

An ancient writing that is proved to have been found amongst Deeds and evidences of Land, may be given in evidence, although the executing of it cannot be proved, for 'tis hard to prove ancient things, and finding them in such a place, by presumption, they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty. 24 Car. B. R.

A

A writing or answer permitted to be read in part, may be read in toto. Totum & pars.

A Copy of part of a Record cannot be given in evidence, unless 'tis proved that the part shewed in evidence is all concerning the matter in question. Copy of Records.

A transcript of a Record or Enrollment of a Deed may be given in evidence, for they are things to be credited being made by Officers of trust. Transcript Enrollment.

The Council of that party who doth begin to maintain the issue, whether of Plaintiff or Defendant, ought to conclude. Council.

A Juror who is a Witness, must be also sworn in open Court to give evidence, if he be called for a Witness; for the Court and Council are to hear the evidence as well as the Jury. Juror.

The Jury may carry from the Bar an exemplification under the Great Seal of Depositions in Chancery, but if they are not Exemplification.

not exemplified, the Jury can only look upon them at the Bar, but not have them with them out of Court.

Leaſe upon an Outlawry.

If one produce a Leaſe made upon an Outlawry, to prove a title, he muſt alſo produce the Outlawry it ſelf: but if it be to prove other matter, he needs not ſhew the Outlawry. And ſo it is of an Extent, without ſhewing the Statute or Judgement on which the Extent is grounded.

Office.

By Rolls an Office found after the death of a Tenant in Capite, of Lands in another County, may be given in evidence to try the title of thoſe Lands, if there was a ſpecial Livery granted unto the Heir.

Bail.

If a Witneſs be Bayl, upon motion the Court will give leave to alter the Bayl. Stiles 385.

Charges.

Debt for 10 l. againſt a Witneſs, upon the Statute 5 Eliz. doth not lie, unleſs the Witneſs hath his charges, and he is not bound to come without his Charges firſt paid: but if he accepts of 12 d. and a promiſe for the reſt at the tryal, he is

is bound, and an action lieth against him if he doth not come. Cro. 1 part 522. 540. Goodwin against West.

A Counsellor may be examined as a Witness against his Client, so far as it is of his own knowledge, not what his Client reveals to him, and he knows only by his Clients information. Counsellor.

In Criminal causes against the King Witnesses may be sworn, unless the Crime be Capital. Criminal causes.

Tenant at Will of part of the Lands was admitted to prove Livery of seisin and the execution of a Feoffment under which he held. Bulst. 1 part 202. Tenant at Will.

If one be attainted of Felony and pardoned, he shall not afterwards be sworn of a Jury, for Pœna mori potest, culpa perennis erit, and therefore is not fit to serve on the Inquest, nor yet to be an indifferent Witness, and two such persons proving a suggestion, were rejected, and the prohibition disallowed. Brown against Crasham Bulst. 2 part. 154. Attainted of Felony.

In

Simul cum. In Trespass with a simul cum, if nothing be proved against them in the simul cum, they may be examined as Witnesses. Stiles Reports 401.

CAP.

CAP. XII.

The Juries Oath; why called Recognitors in an Aſſiſe, and Jurors in a Jury; of the Tryal *per medietatem linguæ*; when to be prayed, and when grantable. Of a tryal betwixt two Aliens, by all *Engliſh*. Of the *Venire facias*; *per medietatem linguæ*, and of Challenges to ſuch Juries.

THe Jury having heard their Evidence, let them now conſider of their Verdict; But firſt they muſt remember their Oath, which in effect is, To find according to their Evidence; and therefore they ſhould have had it before the Evidence, but that the form and order of the Venire facias, (which I have tyed my ſelf to follow,) leads me to it after their Evidence, in theſe words; Ad faciend. quandam Juratam; I have already ſhewed the derivation of this word Jurata, and what is the legal acceptation of it; only obſerve with our great Maſter Littleton, That the word Aſſize, is ſometimes taken for a Jury, ſo as the Learned Commentator doth

Aſſiſe, Enqueſt and Proof, are taken for the word *Jury*. Vide 28 E. 3. 13.

See Chap. 1.

1 Inſt. 154.

Assiza for *Jurata.*

both well paraphrase, That the word Assise, is Nomen Æquivocum Æquivocans, because sometime it signifieth a Jury, sometime the Writ of Assise, and sometime an Ordinance, or Statute; But Jurata, is Nomen Æquivocum Æquivocatum, because we always understand that word (according to the aforesaid definition) to be a Jury of twelve men,

The Juries Oath.

so called, by reason of the Oath they take, Truly to try the Suit of Nisi prius, between party and party, according to their Evidence.

Why called Recognitors in an Assise, and Jurors in a Jury.

And as in an Assise, the Jurors are called Recognitors, from these words in the Writ of Assise, facere Recognitionem; so upon a Nisi prius, they are called Juratores, from these words in the Venire facias, Ad faciend. quandam Juratam.

12 Knights.

In ancient time, the Jury, as well in Common Pleas, as in Pleas of the Crown, were 12 Knights, as appears by Glanvil, lib. 2. cap. 14. and Bracton, fol. 116.

The next words of the Venire facias, are Inter partes predictas. In the fourth Chapter, I have instanced, That in some Cases, a Jury shall be awarded betwixt the party, and a Stranger to the Writ and Issue; I will now shew what the Jury shall be, when one of the parties is an Alien, the other a Denizen; and when both parties to the Issue are Aliens.

This

This Tryal is called in Latine, Triatio b linguis, or per medietatem linguæ. And this Tryal by the Common Law was wont to be obtained of the King, by his Grant made to any Company of ſtrangers, as to the Company of Lumbards, or Almaignes, or to any other Company, that when any of them was impleaded, the moyety of the Inqueſt ſhould be of their own tongue. Stan. Plea, Cor. lib. 3. cap. 7. *Jury per medietatem linguæ.*

And this Tryal in ſome Caſes, per medietatem linguæ, was before the Conqueſt, as appears by Lamb. fol. 91, 3. Viri duodeni Jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis Jus dicanto. And of ancient time, it was called Duodecim virale Judicium. 1 Inſt. 155. Its Antiquity.

But afterwards, this Law became univerſal: firſt by the Statute of 27 Ed. 3. cap. 8. It was Enacted, that in Pleas before the Maior of the Staple, if both parties were ſtrangers, the Tryal ſhould be by ſtrangers. But if one party was a ſtranger, and the other a Denizen, then the Tryal ſhould be per medietatem linguæ. But this Statute extended but to a narrow Compaſs, to wit, only where both parties were Merchants or Miniſters of the Staple, and in Pleas before the Maior of the Staple. But afterwards, in 28th Year of the ſame Kings Reign, cap. 13. It was Enacted,

That in all manner of Enqueſts and Proofs, which be to be taken or made amongſt Aliens, and Denizens, be they Merchants, or other, as well before the Maior of the Staple, as before any other Juſtices, or Miniſters, although the King *be party. The one half of the Enqueſt, or Proof, ſhall be Denizens, and the other half Aliens, if ſo many Aliens and Foreigners be in the Town, or place, where ſuch Enqueſt or Proof is to be taken, that be not parties, nor with the parties in Contracts, Pleas, or other Quarrels, whereof ſuch Enqueſt or Proof ought to be taken: And if there be not ſo many Aliens, then ſhall there be put in ſuch Enqueſts or Proofs, as many Aliens, as ſhall be found in the ſame Towns or places, which be not thereto parties, nor with the parties, as aforeſaid is ſaid, and the Remnant of Denizens, which be good men, and not ſuſpitious to the one party, nor to the other.*

King. So that this is the Statute which makes the Law univerſal, concerning the medietatem linguæ; for though the King be party, yet the Alien may have this Tryal. And it matters

matters not, whether the Moyety of Aliens, be of the ſame Country as the Alien, party to the Action, is: for he may be a Portugal, and they Spaniards, &c. becauſe the Stat. ſpeaks generally of Aliens. See Dyer 144.

Venire facias, per medietatem linguæ.

And the form of the Venire facias, in this Caſe is De vicenet, &c. Quorum una medietas ſit de Indigenis, & altera medietas ſit de alienigenis natis, &c. And the Sheriff ought to return 12 Aliens, and 12 Denizens, one by the other, with addition which of them are Aliens, and ſo they are to be ſworn. But if this Order be not obſerved, it is holpen as a miſ-return, by the Statutes of 18 Eliz. Cro. 3. part 818. 841. So that Brooks ſays, it is not proper to call it a Tryal per medietatem linguæ, becauſe any Aliens of any tongue may ſerve. But under his favour, I think it proper enough.

For people are diſtinguiſhed by their Language, and Medietas Linguæ, is as much as to ſay, half Engliſh, and half of another tongue or Country whatſoever. Though it be not material of what ſufficiency the Jurors are, yet the form of the Venire facias, ſhall not be altered, but the Clauſe of Quorum quilibet habeat, 4 l. &c. ſhall be in, Cro. 3. part. 481.

But ſuppoſe that both parties be Aliens, of whom ſhall the Inqueſt be then? It is reſolved,

ſolved, that the Inqueſt ſhall be all Engliſh; for though the Engliſh may be ſuppoſed to favour themſelves more than ſtrangers, yet when both parties are Aliens, it will be preſumed, they favour both alike, and ſo indifferent. 21 H. 6. 4. but if the Plea be before the Maior of the Staple, and both parties Alien Merchants of the Staple; it ſhall be tryed by all Aliens. Stamford's Pleas del Corone. 159. A Scotchman is a Subject, and ſhall not have this Tryal. Egyptians are alſo excluded when tryed for Felony, made by the Statute againſt them, 1 Phil. & Mar. cap. 4. 5 Eliz. cap. 20.

All Engliſh.

Where an Alien is party, yet if the Tryal be by all Engliſh, it is not erroneous, becauſe it is at his peril, if he will ſlip his time, and not make uſe of the advantage which the Law giveth him when he ſhould. Dyer 28.

When the Alien ſhould pray a *Venire facias per medietatem.*

The Alien ought to pray a Venire facias, per medietatem linguæ, at the time of the awarding the Venire facias: But if he doth it at any time before a general Venire facias be returned and filed, the Court may grant him a Venire facias, de novo. Dyer 144. 21 H. 7. 32. though it hath been queſtioned.

Tales.

But if he hath a general Venire facias, he cannot pray a Decem tales, &c. per medietatem linguæ, upon this; becauſe the Tales ought

ought to pursue the Venire facias. 3 E. 4. 11, 12. And so if the Venire facias be per medietatem linguæ, the Tales ought to be per medietatem linguæ, as if 6 Denizens, and 5 Aliens appear of the principal Jury, the Plaintiff may have a Tales, per medietatem linguæ, li. 10. 104. But if in this case the Tales be general, de circumstantibus, it hath been held good enough; for there being no exception taken by the Defendant, upon the awarding thereof, it shall be intended well awarded. Cro. 3. part. 818, 841. Tales.

If the Plaintiff or Defendant be Executor or Administrator, &c. though he be an Alien, yet the Tryal shall be by English, because he sueth in auter droit; but if it be averred that the Testator, or intestate, was an Alien, then it shall be per medietat. linguæ. Cro. 3. part 275. Where the Tryal of an Aliens cause shall be by English.

Mich. 40 & 41 Eliz. The Queens Attorney exhibited an Information against Barre, and divers other Merchants, some whereof were English, and some Aliens; After Issue, the Aliens prayed a Tryal per medietat. linguæ. But all the Justices of England resolved, that the Tryal should be by all English, and likened it to the case of priviledge, where one of the Defendants demands priviledge, and the Court, as to his Companion cannot hold Plea there he shall be ousted of his priviledge, sic hic. More 557. Part English, and part Aliens.

By

Challenge.

By the Statute of 8 H. 6. cap. 29. 29. Insufficiency, or want of Freehold, is no cause of Challenge to Aliens, who are impannelled with the English (notwithstanding Stamford's Opinion. Pl. Coron. 160) for this Statute saith, that the Stat. 2 H. 5. 3. shall extend only to Enquests betwixt Denizen and Denizen.

When the Alien should pray a *Venire facias per medietatem.*

If the Defendant do not inform the Court that he is an Alien, upon awarding of the Venire facias, and so pray a Venire facias, per medietatem linguæ; he cannot challenge the Array for this cause at the Tryal, if the Jury be all Denizens (notwithstanding Stamford's Opinion to the contrary, and the Books cited by him, fol. 159. pl. Cor.) For the Alien at his peril should pray a Venire facias, per medietatem linguæ. Dyer 357. Vide Rolls tit. Trial, 643.

If the Plaintiff be an Alien, he must suggest it before the awarding of the Venire facias; but if the Defendant be an Alien, the Plaintiff is allowed to surmise that, before or after the Venire facias, because the Defendants quality may not be known to him before. 27 H. 7. 32.

CAP.

CAP. XIII.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inqueſt ſhall be taken by default. Inqueſts of Office, &c. Arreſt of Judgment, Variance betwixt the Nar. and the Verdict, &c.

VErdit or Verdict; In Latine, Vere dictum, quaſi dictum veritatis, As Judicium, eſt quaſi Juris dictum: Is the Anſwer and Reſolution of thoſe 12 men; concerning the matter of fact referred to them by the Court, upon the Iſſue of the parties. And this is the foundation, upon which the Judgment of the Court is built, for ex facto jus oritur; the Law ariſeth from the fact; Wherefore it is no wonder, that the Law hath ever bæn ſo curious, and cautelous, as not to believe the matter of fact, until it is ſworn by 12 ſufficient men, of the Neighbourhood where the fact was done, whom the Law ſuppoſeth to have moſt cogniſance of the truth, or falſehood thereof: which being Verdict.

The Credit of Verdicts.

ſworn (for the words are, Juratores predict. dicunt ſuper ſacrum ſuum, &c.) is the Verdict, whereof we now treat; And ſuch credit doth the Law give to Verdicts, that no proof will be admitted to impeach the verity thereof, ſo long as the Verdict ſtands not reverſed by Attaint. And therefore upon an Attaint, no Superſedeas is grantable by Law. Plo. Com. 496.

And it is worth our obſervation, that the Law ſeems to take more care of the fact, than of her ſelf; for the Major part of the Judges give the Judgement of the Law, though the other Judges diſſent. But every one of the 12 Jurors muſt agree together of the fact, before there can be a Verdict, which muſt be delivered by the firſt man of the Jury. 29 Aſſiſe. pl. 27.

General or ſpecial.

And this Verdict is of two kinds, viz. one general, and the other ſpecial, or at large.

General Verdict.

The general Verdict, is poſitively, either in the Affirmative, or Negative, as in Treſpaſs, upon Not guilty pleaded; The Jury find Guilty, or Not guilty; And ſo in an Aſſize of Novel diſſeiſin, brought by A. againſt B. The Plaintiff makes his plaint, Quod B. diſſeiſivit eum de 20 acris terræ, cum pertinentiis, The Tenant pleads, Quod ipſe nullam injuriam ſeu diſſeiſinam prefato A. inde fecit, &c. The Recognitors of the Aſſize do find, Quod predict. B. in juſte & ſine judicio diſſeiſivit

diſſeiſivit predict. A. de predict. 20 acris terræ cum pertinentiis, &c. This is a general Verdict. 1 Inſt. 228.

A Special Verdict, or Verdict at large, is ſo called, becauſe it findeth the ſpecial matter at large, and leaveth the Judgment of the Law thereupon, to the Court, of which kind of Verdict it is ſaid, Omnis Concluſio boni, & veri judicii ſequitur, ex bonis & veris premiſſis, & dictis Juratorum. And as a Special Verdict may be found in Common-Pleas, ſo may it alſo be found, in Pleas of the Crown, or Criminal Cauſes that concern life or member. Special Verdict. 1 Inſtit. 226.

And it is to be obſerved, that the Court cannot refuſe a Special Verdict, if it be pertinent to the matter in Iſſue. 1 Inſt. 228. The Court cannot refuſe it.

It hath been queſtioned, whether the Jury could find a Special Verdict, upon a ſpecial point in Iſſue, or no, as they might upon the general Iſſue. But this queſtion hath been fully reſolved in many of our Books, firſt in Plo. Com. 92. It is reſolved, That the Jury may give a ſpecial Verdict, and find the matter at large, en cheſcun iſſue en le monde, ſo that the matter found at large, tend only to the Iſſue joyned, and contain the certainty and verity thereof. lib. 9. 12. A ſpecial Verdict may be found upon any Iſſue, as upon an *abſq; hoc, &c.*

And in 2 Inſt. 425. upon Collection of many

many Authors, it is said, That it hath been resolved, that in all Actions, real personal, and mixt, and upon all Issues joyned, general or special, the Jury might find the special matter of fact, pertinent, and tending onely to the Issue joyned, and thereupon pray the discretion of the Court for the Law. And this the Jurors might do at Common Law, not only in Cases between party and party, but also in Pleas of the Crown, at the Kings Suit, which is a proof of the Common Law. And the Statute of Westm the 2d cap. 30. is but an affirmative of the Common Law.

A Free-hold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

And as this special Verdict is the safest for the Jury, 1 Inst. 228. so in many Cases it is most advantagious to the party, and helps him where his own pleading cannot. As for example, saith Littleton, Sect. 366, 367, 368. Albeit a man cannot in any Action, plead a Condition, which toucheth and concerns a Freehold, without shewing writing of this; yet a man may be ayded, upon such a Condition, by the Verdict of 12 men, taken at large, in an Assize of Novel disseisin, or in any other Action, where the Justices will take the Verdict of 12 Jurors at large: As put the case, a man seized of certain Land in Fee; letteth the same Land to another, for term of life, without Deed; upon Condition to render to the Lessor, a certain Rent, and for default of payment, a Re-

entry,

entry, &c. By force whereof the Lessee is seised as of Freehold; and after, the Rent is behind, by which the Lessor entreth into the Land, and after the Lessee arraign an Assize of Novel disseisin, of the Land against the Lessor, who pleads that he did no wrong, nor Disseisin. And upon this, an Assize is taken. In this case, the Recognitors of the Assize may say, and render to the Justices, their Verdict at large, upon the whole matter; as to say, that the Defendant was seized of the Land, in his Demesne as of Fee, and so seized, let the same Land to the Plaintiff, for term of his life, rendring to the Lessor such a yearly Rent payable at such a Feast, &c. Upon such Condition, that if the Rent were behind at any such Feast, at which it ought to be paid, then it should be lawful for the Lessor to enter, &c. By force of which Lease, the Plaintiff was seized in his Demesn, as of Freehold, and that afterwards, the Rent was behind, at such a Feast, &c. By which the Lessor entred into the Land, upon the possession of the Lessee. And pray the discretion of the Justices, if this be a Disseisin done to the Plaintiff, or not. Then, for that it appeareth to the Justices, that this was no Disseisin to the Plaintiff, insomuch, as the Entry of the Lessor was congeable on him, The Justices ought to give Judgment, that the Plaintiff shall not take any thing by his Writ of Assize, and so in such case, the Lessor shall be ayded,

and

and yet no Writing was ever made of the Condition: For as well as the Jurors may have Conusance of the Lease, they also as well may have Conusance of the Condition, which was declared and rehearsed upon the Lease.

In the same manner it is of a Feoffment in Fee, or a guift in tail, upon Condition, although no Writing were ever made of it. And as it is said of a Verdict at large, in an Assize, &c. In the same manner it is of a Writ of Entry, founded upon a Disseisin, and in all other Actions, where the Justices will take the Verdict at large, there where such Verdict at large is made, the manner of the whole Entry is put in Issue.

But in Assise of Rent it cannot be found to be upon Condition, unless they also find the Deed of the Condition.

So of a Confirmation in Fee to Lessee for years.

Per Hale Ch. Just. Guild-hall, Hill. 1671.

A Special Verdict may be found as to Damages in an Action of the Case: as the Case was there, viz. Pro Quer', and if so, &c. then such Damages; if so, &c. then Damages such; and he said, he had known it so done in Debt, and the Damages three ways.

Also

Also in such case, where the Enquest may give their Verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their Verdict generally, as is put in their charge, as in the case aforesaid, they may well say, that the Lessor did not disseize the Lessee, if they will, &c. General Verdict.

The Jury may likewise find Estoppel, which cannot be pleaded, as in the 2d Report, fol. 4. it well appears, where one Goddard, Administrator of James Newton, brought an Action of debt against John Denton, upon an Obligation made to the Intestate, bearing date the 4th day of April, Anno 24 Eliz. The Defendant pleaded, that the Intestate dyed before the Date of the Obligation, and so concluded, that the said Escript, was not his Deed, upon which they were at Issue. Estoppels.

And the Jury found that the Defendant delivered it as his Deed 30 July, Anno 23. Eliz. and found the Tenor of the Deed in hæc verba, Noverint universi, &c. Dat. 4. Aprilis, Anno 24 Eliz. And that the Defendant was alive 30 July, Anno 23. Eliz. And that he dyed before the said date of the Obligation, and prayed consideration of the Court, if this was the Defendants Deed; And it was adjudged by Anderson, Chief Justice Windham, Periam, and Walmesley, that this was

was his Deed, And the Reason of the Judgment was, That although the Obligee, in pleading, cannot alledge the delivery before the date, as it is adjudged in 12 H. 6. 1. which case was affirmed to be good Law, because he is estopped to take an averment against any thing expressed in the Deed; yet the Jurors, who are sworn ad veritatem dicend. shall not be estopped. For an Estoppel is to be concluded to speak the truth, and therefore Jurors cannot be estopped, because they are sworn to speak the truth.

Note, that a Deed may be pleaded to be delivered after the date, but not before, because it shall not be intended, written before the date, which may be after the date. 12 H. 6. 1.

But if the Estoppel or Admittance, be within the same Record in which the Issue is joyned, upon which the Jurors give their Verdict, there they cannot find any thing against this, which the parties have affirmed, and admitted of Record, although it be not true; For the Court may give Judgement upon a thing confessed by the parties, and the Jurors are not to be charged with any such thing, but only with things in which the parties vary. Ib. li. 5. 30. [illegible].

As in Wast supposed in *A.* to plead that *A* is a hamlet in *B.* and not a Town of it self, admitteth the Wast, *&c.* 9 H. 6.66. and the Jury cannot find no Wast, for that would be against the Record.

Estoppel.

So Estoppels, which bind the Interest of the Land, as the taking of a Lease of a mans own Land, by Deed indented, and the like, being specially found by the Jury, the Court ought to judge, according to the special matter; for albeit Estoppels regularly must be pleaded and relyed upon, by apt conclusion, and the Jury is sworn ad veritatem dicend.

Cro. 1. part 110. Lib. 4. 53.

yet

yet when they find veritatem facti, they perſue well their Oath, and the Court ought to adjudge according to Law. So may the Jury find a Warranty being given in Evidence, though it be not pleaded, becauſe it bindeth the right, unleſs it be in a Writ of Right, when the Miſe is joyned upon the meer right. 1 Inſt. 227.

Warranty not pleaded.

Verdicts ought to be ſuch, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding matter incertainly, or ambiguouſly, are inſufficient and void, and no Judgment ſhall be given thereupon: As if an Executor plead Plene Adminiſtravit, and Iſſue is joyned thereon, and the Jury find that the Defendant hath Goods within his hands to be adminiſtred, but find not to what value, this is an uncertainty, and therefore an inſufficient Verdict. li. 9. 74. 1 Inſt. 227.

Uncertain Verdicts.

It is the Office of the Jurors, to ſhew the verity of the fact, and leave the Judgment of the Law to the Court. And therefore upon an Indictment of Murder, quod felonice per cuſſit, &c. If the Jury find per cuſſit tantum, yet the Verdict is good, for the Judges of the Court are to reſolve upon the ſpecial matter, whether it was felonice, and ſo Murder, or not. li. 9. 69. And if the Court adjudge it Murder, then the Jurors in the concluſion of their Verdict, find the Felon

The Office of the Jury.

guilty of the murther contained in the Indictment.

Verdict finding part of the Issue.

More 405.

A Verdict that finds part of the Issue, and finding nothing for the rest, is insufficient for the whole, because they have not tryed the whole Issue, wherewith they are charged; As if an Information of intrusion, be brought against one, for intruding into a Messuage, and 100 Acres of Land, upon the general Issue, the Jury find against the Defendant for the Land, but say nothing for the House, this is insufficient for the whole.

Finding more than the Issue.

But if the Jury give a Verdict of the whole Issue, and of more, &c. That which is more, is Surplusage, and shall not stay Judgment: for Utile per inutile non vitiatur, Leon. 1 part. 66. Cro. 1 part. 130. But necessary incidents required by Law, the Jury may find.

Where the Verdict ought to be of more than is in the Issue.

Yet in many Cases, (nay almost in all) the Jury ought to find more than is put in Issue, otherwise their Verdict is not good; and therefore they are to assess Damages and Cost, because it is parcel of their Charge, as a Consequent upon the Issue, though it be not part of the Issue in terminis. li. 10. 119.

An Action of the Case on Deceit was brought, for that he sold unto the Plaintiff two

two Oxen, and warranted them to be ſound; on not Guilty, the Jury found him Guilty as to one, and not Guilty to the other, and good; for that the Action was founded not on the Contract, but the Deceit. 3 Cro. 884. Gravenor and Mete.

In Debt the Plaintiff declares, that he had Judgment againſt Baron and Feme for a Debt of the Wives, dum ſola, &c. that they were in Execution, and ſuffered to eſcape, the Jury found the Husband only in Execution and eſcaped, and Judgment for the Plaintiff. Roberts verſus Herbert, Hill. 12. Car. 2. C. B.

So in Treſpaſs againſt two, one comes, and pleads Not guilty, and is found guilty. In this caſe, the firſt Inqueſt ſhall aſſeſs damages for the whole Treſpaſs, by both Defendants; and afterwards, the other comes, and pleads Not guilty, and is found guilty: The finding of Damages by the firſt Inqueſt, to which he was not party, ſhall bind him; and therefore if the Damages are outragious, and exceſſive, the Defendant in the laſt Enqueſt, ſhall have an Attaint. li. 10. 119. Damages by the firſt Inqueſt. Attaint.

So in Treſpaſs, Quare clauſum fregit, if Iſſue be joyned upon a Feoffment, and the Jury give outragious Damages, An Attaint lies; for the inquiry of Damages is conſe-

quent and dependant upon the Issue, and parcel of their charge. Ibidem.

Damages by the first Inquest.

In the 11th Report, fo. 5. It was resolved, That in Trespass against two, where one comes and appears, &c. against whom the Plaintiff declares with a simul Cum,&c. who pleads and is found guilty, and Damages assessed by the Enquest, and afterwards the other comes and pleads, and is found guilty; The Defendant which pleaded last, shall be charged with the Damages tared by the first Inquest; for the Trespass which the Plaintiff had made joynt by his Writ, and Count, and done at one time, cannot be severed by the Jurors; if they find the Trespass to be done by all, at one and the same time as the Plaintiff declared.

Several Damages. Vide Devant ca. 4.

So in the Trespass against divers Defendants, if they plead not guilty, or several Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot assess several Damages against the Defendants, because all is but one Trespass, and made joynt by the Plaintiff, by his Writ and Count. And although that one of them was more malicious, and de facto, did more and greater wrong than the others, yet all came to do an unlawful act, and were of one party, so that the act of one, is the act of all, of the same party being present. But in Trespass against two, if the Jurors find one guilty,

at

at one time, and the other at another time, there ſeveral Damages may be tared. But if the Plaintiff bring an Action of Treſpaſs againſt two, and declare upon a ſeveral Treſpaſs, his Action ſhall abate. And this is the diverſity between the finding of the Jury, and the confeſſion of the party.

And in Treſpaſs, where the Defendants plead ſeveral Pleas, all tryable by one Jury, and they find generally for the Plaintiff, the Jurors cannot ſever the Damages; if they do, their Verdict is vicious.

But in Treſpaſs againſt two, where one appears, and pleads not guilty to a Declaration againſt him, with a ſimul Cum, &c. and afterwards the other appears, and pleads not guilty to a Declaration againſt him alſo, with a ſimul Cum, &c. Whereupon two Venire fac. iſſue out, and one Iſſue tryed after the other, and ſeveral Damages aſſeſſed: in judgment of the Law, the ſeveral Juries give one Verdict, all at one time, and the Plaintiff hath his Election to have judgment de melioribus dampnis, by any of the Inqueſts. And this ſhall bind all, but fiat niſi una Executio. Judgment *de melioribus dampnis.*

It is a Maxim, That in every caſe where an Inqueſt is taken by the Miſe of the parties, by the ſame Inqueſt ſhall damages be tared for all: And in Mich. 39 H. 6. fo. 1. In an Action Damages.

Action of Treſpaſs againſt many, (who pleaded in Barr the Term before) and one of them made default, which was Recorded, There it is reſolved by all the Court, That for ſaving of a Diſcontinuance, a Writ of Enquiry of Damages ſhall be awarded; but none ſhall iſſue out, becauſe he ſhall be contributory to the damages tared by the Inqueſt, at the Miſe of the parties, if it be found for the Plaintiff; and if it be found againſt the Plaintiff, then the Writ of Enquiry ſhall iſſue forth.

Writ of Inquiry.

And the Reaſon wherefore no Writ ſhall iſſue out at firſt, to inquire of damages until, &c. is, becauſe that if a Writ ſhould iſſue out, and be executed, this is nothing but an Inqueſt of Office, and not at the Miſe of the parties, and yet this Inquiry (if it might be allowed) ought to ſerve for all the damages; For inquiry of damages, ſhall not be twice, and the others which have pleaded to Inqueſt, if the Iſſue be found againſt them, ſhall be chargeable to thoſe damages which are found by the Inqueſt of Office, and if they be exceſſive, they ſhall have no remedy, although there be no default in them; for they cannot have an Attaint, becauſe it is but an Inqueſt of Office.

But in Treſpaſs againſt two, who plead not guilty, &c. ſeverally; and ſeveral Venire fac. awarded. The Inqueſt which firſt paſſes, ſhall aſſeſs

Damages by the firſt Inqueſt.

aſſeſs damages for all, and the ſecond Inqueſt ought not to aſſeſs damages at all, but that Defendant ſhall be contributory to the damages aſſeſſed by the firſt Jury, notwithſtanding he is not party to it; yet if theſe damages be exceſſive, he ſhall have an Attaint, (becauſe though he is a ſtranger to the Iſſue, yet in Law, he is privy in Charge.) And ſo no damage or miſchief can accrue to him in this Caſe.

Verdict, when to be ſupplied, by Writ of Inquiry, &c.

Now let us ſee, when ſomething is left out of the Verdict which the Jury ought to have inquired of, whether it may be ſupplied by matter ex poſt facto; and how: And for this, know, that if damages be left out of a Verdict, this omiſſion cannot be ſupplied, by Writ of Inquiry of damages: for this would prevent the Defendant of his Remedy by Attaint, which would be very miſchievous; for then ſuch omiſſion might be on purpoſe, to deprive the Plaintiff of his Attaint, li. 10. 119.

Vide hic. cap. 6.

And the Rule is, That when the Court ex officio, ought to inquire of any thing, upon which no Attaint lies, There the omiſſion of this, may be ſupplyed by a Writ of Inquiry of damages; as in a Quare impedit, if the Jury omit to enquire of theſe 4 things, that is to ſay, de plenitudine, ex cujus preſentatione, ſi tempus ſemeſtre tranſierit, and the value of the Church per annum, there

the

the Plaintiff may have a Writ to inquire of these points. Dyer 241. 260. because of these no Attaint lies, as it is holden in 11 H. 4. 80. because that as to these, the Inquest is but of Office. But in all cases, where any point is omitted, whereof on Attaint lyeth, there this shall not be supplyed by Writ of Inquiry, upon which no Attaint lyeth. And therefore in Detinue, if the Jury find Damages and Cost, and no value, as they ought, this shall not be supplyed by Writ of Inquiry of damages, for the Reason aforesaid. 16. Et sic in similibus.

Verdict set aside, because the damages not well assessed.

But how then? What, shall the Plaintiff loose the benefit of his Verdict, because the Jury assessed no damages, (or did insufficiently assess them)? Certes in such Cases where damages only are to be recovered, he must loose the whole benefit of his Verdict; but where any thing else is to be recovered, besides damages, as in Debt, Ejectment, &c. he may release his damages, and have Judgment upon his Verdict as to the rest. And so where damages are to be recovered, if part of them are assessed insufficiently, and part well, he may have Judgment for those damages well assessed. And oftentimes the insufficiency of the Declaration shall set aside the Verdict; as if an Action upon the Case be brought upon two promises, and one of them be insufficiently laid, and the Verdict give intire damages, this is naught for the whole,

Release Damages.

Verdict set aside in part.

For insufficiency in the Declaration.

whole; But if the Damages had been severally assessed upon the several promises, then the Verdict as to the promise well laid, should have stood.

In the 11th Report, fo. 56. Marsh brought a Writ of Annuity against Bencham; and the parties discended to issue, which was tryed for the Plaintiff, and the Arrerages found, &c. But the Jurors did not assess any damages, or Cost; which Verdict was insufficient, and could not be supplyed by Writ of Inquiry of damages: wherefore the Plaintiff released his damages, and costs, and upon this had Judgment: upon which the Defendant brought a Writ of Error, and assigned the Error aforesaid, scil. the insufficiency of the Verdict; sed Judicium affirmatur, because the Plaintiff had released his damages and costs, which is for the benefit of the Defendant.

Release of damages where none were assessed.

In Detinue of Charters, or non detinet, Verdict for the Plaintiff, and Damages, but the Jury did not find the value of the Deeds, and a Writ of Inquiry was awarded to that purpose and returned, and ruled good; and by Twisden Just. Debt against Executor who pleads plene, &c. and it's found against him, and the Jury give no damages, that can't be aided by Writ of Inquiry. Burton versus Robinson, Pasch. 17 Car. 2. B. R.

Releaſe of damages where they were not well aſſeſſed.

In Dyer 22 Eliz. 369. 370. In a Writ of Ejectione Cuſtodiæ terræ & hæredis, the Jurors aſſeſſed damages intirely, which was inſufficient; for it lay not for the Heir, yet the Plaintiff releaſed his damages, and had Judgment for the Land: And Note, that inſufficient aſſeſsment of damages, and no aſſeſſing, is all one.

Damages and Coſts.

The Jury ought to aſſeſs no more damages pro injuria illata, than the Plaintiff declares for: But they may aſſeſs ſo much, and moreover give coſt, which is called Expenſæ litis; though in the proper and general ſignification. Dampnum, alſo comprehends Coſts of Suit, as the Entry reciting both damages and coſts, well affirms, ſcil. Quæ dampna intoto ſe attingunt cum, &c.

More damages than the Plaintiff declares for.

But if the Jury do aſſeſs more damages then the Plaintiff declares for, the Plaintiff may remit the overplus, and pray Judgment for the reſidue, as in the 10th Report, fol. 115. in Treſpaſs the Plaintiff declared ad dampnum, &c. 40 l. at the tryal the Jury aſſeſſed damages occaſione tranſgreſſionis pr dict. ad 49 l. and for coſts of Suit 20 s. upon which Verdict, the Plaintiff at the day in Bank, remitted 9 l. parcel of the ſaid 49 l. aſſeſſed for damages, and prayed Judgement for 40 l. (to which damage he had counted) with increaſe of coſts of ſuit, and had 9 l. de Incremento, added by the Court, which in all amounted

Damages remitted.

amounted to 50 l. and had his Judgment accordingly: upon which, a Writ of Error was brought, and the Judgment affirmed.

For as in real Actions the Demandant shall not count to Damages, &c. because it is incertain to what sum the damages will amount, by reason he is to recover damages pendant le briefe; so in the case of Costs, he shall recover for the expences depending the suit, which being uncertain, cannot be comprehended in the Count, because the Count extends to damages past, and not to expences of Suit. For in personal Actions, he counts to damages, because he shall recover damages only for the wrong done, before the Writ brought, and shall not recover damages for any thing, pendant le briefe. But in real Actions the Demandant never counts to damages, because he is to recover damages also, pendant le briefe, which are incertain. Damages in real and personal Actions.

The Jury may if they will, assess the damages and costs intirely together, without making any distinction, 18 E. 4. 23. But then they must not assess more damages and costs, than the damages are, which the Plaintiff counts to; for if they do, the Plaintiff shall recover only so much as he hath declared for, without any increase of cost, because the Court cannot distinguish how much they intended for cost, and how much for damages. Damages and Costs intirely assessed.

As in 13 H. 7. 16. 17. One Darrel brought a Writ of Trespass, and counted to his damage 20 marks; the Defendant pleaded not guilty, and the Jury taxed the damages and costs of suit joyntly to 22 marks, and the Verdict was held to be good for 20 marks, and void for the residue, because it doth not appear how much was intended for damages, and how much for costs, so that there may be more damages than the Plaintiff declared for, or less, and so the Court knows not how to increase the cost; wherefore he shall have Judgment but for 20 marks, by reason of the incertainty.

Verdict amended by the Notes.

Where a special Verdict is not entred according to the Notes, the Record may be amended, and made agree with the Notes at any time, though it be 3, or 4, &c. Terms after it is entred. lib. 4. 52. lib. 8. 162. Cro. 1 part. 145.

In the Case of Turnor and Thalgate, Mich. 1658. B. R. It was said per Cur' That special Verdicts may be amended by the Notes, but the Notes cannot be amended or inlarged by any Averment or Affidavit, for that were to find a Verdict by the Court. Yet in that Case, where the Notes were, that the Judgment, &c. was vacated pro ut per Rule, the Verdict was amended, vacated per Cur' pro ut per Rule; for so is implied in the Notes.

See a Verdict amended by the Notes after Judgment and Error brought, Rolls. 1 part. Reports. 82.

If the matter and substance of the Issue be found, it is sufficient; for precise forms are not required by Law in special Verdicts, (which are the finding of Lay-men) as in Pleadings, which are made by men learned in the Law; and therefore intendment in many Cases shall help a special Verdict, as much as a Testament, Arbitrament, &c. And herefore he which makes a Deputy, ought to do it by Escript; but when the Jury find generally, that A. was Deputy to B. all necessary incidents are found by this; and upon the matter they find, that he was made Deputy by Deed, because it do h tantamount. lib. 9. 51. And in the 5th Report, Goodale's Case. It was resolved, That all matters in a special Verdict, shall be intended, and supplyed, but only that which the Jury refer to the Consideration of the Court. Form. Hob. 54.

In all Cases where the Jury find the matter committed to their charge, at large, and over more conclude against Law, the Verdict is good, and the conclusion ill. li. 4. 42. and the Judges of the Law will give Judgment upon the special matter according to the Law, without having regard to the conclusion of the Jury, who ought not to take upon them Judgment of the Law. li. 11. 10. Vide Devant. Ill conclusion. More 105. 269.

Where

As general as the Narr.

Where the Declaration in Treſpaſs is Cum aliquibus averiis, of a number uncertain, and the Verdict is as general as the Declaration, cum aliquibus averiis, there the Verdict is good. Cro. 2. part. 662.

In Ejectione firme, where the Plaintiff declared of a Meſſuage, and 300 Acres of Paſture in D. per nomina, of the Manor of Monkhall, and five Cloſes per nomina, &c. upon Not guilty, the Jury gave a ſpecial Verdict, viz. quoad four Cloſes of Paſture, containing by Eſtimation 2000 Acres of Paſture, that the Defendant was Not guilty; Quoad reſiduum, they found matter in Law: And it was moved by Yelverton, That this Verdict was imperfect in all; For when the Jury find that the Defendant was Not guilty of four Cloſes of Paſture, containing by eſtimation, 2000 Acres of Paſture, it is incertain, and doth not appear of how much they acquit him. And then, when they find quoad reſiduum the ſpecial matter, it is incertain what that Reſidue is, ſo there cannot be any Judgment given; and of that Opinion was all the Court, wherefore they awarded a Venire facias de novo, to try that Iſſue. Cro. 2 part. 113.

Quoad Reſiduum, incertain.

Ejectione firmæ of 30 Acres of Land in D. and S. The Defendant was found guilty of 10 Acres, and Quoad Reſiduum not guilty; and it was moved in arreſt of Judgment, That

Quoad Reſiduum.

That it is uncertain in which of the Mills this Land lay: and therefore no Judgment can be given: sed non allocatur, and it was adjudged for the Plaintiff; for the Sheriff shall take his Information from the party for what ten Acres the Verdict was. Cro. last part. 465. diversitas apparet.

Where the Jury find Circumstances upon an Evidence given, to incite them to find fraud, &c. yet the same is not sufficient matter upon which the Court can judge the same to be fraud, &c. Brownlow 2. part. 187. Yet in many Cases, the Jury may find Circumstances and presumptions, upon which the Court ought to judge: As to find that the Husband delivered Goods devised by the Wife. Upon this, the Court adjudged that the Husband assented to the devise at first. Circumstances. More 192.

Where a Verdict is certainly given at the Tryal, and uncertainly returned by the Clerk of the Assizes, &c. The Postea may be amended, upon the Judges certifying the truth how the Verdict was given. Cro. 1. part. 338. *Postea* amended, how.

In many Cases a Verdict may make an ill Plea or Issue good. As in an Action for words, Thou wast perjured, and hast much to answer for it before God; Exception after Verdict for the Plaintiff, in arrest of Judgment: For that it is not laid in the Declaration, Ill Plea, made good by Verdict.

ration, that he ſpake the words in auditu complurimorum, or of any one, according to the uſual form: ſed non allocatur; for being found by the Verdict that he ſpake them, it is not material, although he doth not ſay, in auditu plurimorum; whereupon it was adjudged for the Plaintiff. Cro. 1. part. 199.

See Cro. laſt part. 116. Where the Barr was ill, becauſe no place of payment was alledged, yet the payment being found by Verdict, it was adjudged well enough; for a payment in one place, is a payment in all places.

Treſpaſs by Baron and feme de clauſo fracto, of the Barons. And for the battery of the feme, ad dampnum ipſorum, the Defendant, Quoad the Clauſum fregit, pleaded Not guilty, Quoad the Battery juſtifies. And for the firſt Iſſue, it was found for the Defendant: And for the ſecond, for the Plaintiff, and now moved in arreſt of Judgment, that the Declaration is not good, becauſe the Baron joyns the feme with him in Treſpaſs de clauſo fracto of the Barons, which ought not to be; But for the Battery of the feme, they may joyn, whereto all the Court agréd; But it was moved, That in regard it was found againſt the Plaintiffs for this Iſſue, in which they ought not to joyn, and the Defendant is thereof acquitted, and the Iſſue is found againſt the Defendant, for

Baron & Feme.

that

that part wherein they ought to joyn: This Verdict hath discharged the Declaration for that part which is ill, and is good for the residue. As in 9 E. 4. 51. Trespass by Baron and Feme for the Battery of both: The Defendant pleaded Not guilty, and found guilty, and damages assessed for the Battery of the Baron, by its self, and for the Battery of the Feme by its self, and Judgment was given for the damages for the battery of the feme, and the Writ abated for the residue. (And of that Opinion was Lea, Chief Justice, and Doderidge al. contra.) And the same Law I conceive, if the Jury had found the Defendant Not guilty of the battery to the Husband, but guilty to the Wife. Cro. 2. part. 655. *Palmer's* Reports, 338.

Rochel and his Wife; brought an Action of Trespass and Assault in the Exchequer, Hill. 1659. against Steel, and others, who pleaded Not guilty, and the Verdict found Steel guilty of the Battery to the Wife; but found nothing concerning the Husband. Wherefore Judgment was stayd; but the Barons held, That if the Jury had found the Defendants not guilty, as to the Husband, then the Verdict had helped the Declaration, and the Plaintiff should have had Judgment for the Damages, for the Battery of the Wife. *Rochel* and his Wife against *Steel.*

The Jury may find any thing that may be given Of what a Verdict may be.

given in Evidence to them, as Records, either Patent, Statute or Judgment. Things done in another County, or Country, for which see Evidence before. Hob. 227. And of those things they ought to have Conusance, they are to have Conusance also, of all Incidents, and dependants thereupon; for an Incident is a thing necessarily depending upon another. Co. Littleton 227. b.

Plo. Com. 411.

Incidents.

How construed.

If the Verdict may by any ways be construed good, a construction to destroy it, ought not to be made.

Outlaw.

If one of the Jury be Outlawed when the Verdict is found, the Verdict is not good, but may be reversed by Error.

In a special Verdict the case in Fact must be found clear to a Common intent without Equivocation. Vaughan's Reports 78.

Contents of a Deed.

If the Jury collect the Contents of a Deed, and also find the Deed in hæc verba, the Court is not to Judge upon their Collection, but upon the Deed it self. The Jury may find the Contents of a Deed or Will proved by Witnesses, Ibidem.

Common.

Trespass for disturbing him of his Common belonging to 100 Acres, and the Jury find Common for 50. this is for the Plaintiff; otherwise upon an Avowry, or Quod permittat,

permittat, which are founded upon the right, but the Triepais is for Damages. Palmer's Rep. 289.

If the matter and substance of the Issue be found, it is sufficient, though it be against the Letter of the Issue. As in the first, Institutes, fo. 114. b. A Modus decimandi was alledged by prescription, time out of mind, for Tythes of Lambs: And thereupon Issue joyned. And the Jury found, that before twenty years then last past, there was such a prescription, and that for these twenty years, he had payd Tythe Lamb in specie. And it was objected first, That the Issue was found against the Plaintiff, for that the prescription was general for all the time of the prescription, and 20 years last thereof. 2. That the party by payment of Tythes in specie, had waved the prescription, or custom. But it was adjudged for the Plaintiff; for albeit, the modus decimandi had not been paid by the space of twenty years, yet the prescription being found, the substance of the Issue is found for the Plaintiff. The Verdict may be against the Letter of the Issue, so the substance is found. Prescription.

In Assise of Darrein Presentment, if the Plaintiff alledge the avoydance of the Church by privation, and the Jury find the voydance by death, the Plaintiff shall have Judgment; for the manner of voydance is not the title of the Plaintiff, but the voydance is the matter. 1 Instit. 282. Avoydance.

Deprivation.

If a Gardein of an Hospital bring an Assise against the Ordinary, he pleadeth that in his Visitation he deprived him as Ordinary, whereupon Issue is taken, and it is found that he deprived him as Patron, the Ordinary shall have judgment, for the deprivation is the substance of the matter. Ib.

Breach of 20 Trees cut down for 10.

The Lessee Covenants with the Lessor, not to cut down any Trees, &c. and binds himself in a Bond of 40 pounds, for the performance of Covenants. The Lessee cut down 10 Trees, the Lessor bringeth an Action of Debt upon the Bond, and assigneth a breach, that the Lessee cut down 20 Trees: whereupon Issue is joyned, and the Jury find that the Lessee cut down ten: Judgment shall be given for the Plaintiff, for sufficient matter of Issue is found for the Plaintiff, to forfeit the Bond. Ib.

Indictment of Murder, and Verdict finds Manslaughter.

And this Rule holds in Criminal Causes: For if A. be appealed, or indicted of Murder, viz. that he of malice prepensed killed J. A. pleadeth that he is not guilty Modo & forma, yet the Jury may find the Defendant guilty of Man-slaughter without malice prepensed, because the killing of J. is the matter, and malice prepensed is but a Circumstance. Plo. Com. 101.

Modo & forma.

And generally where modo & forma, are not of the substance of the Issue, but words of form;

form; there it ſufficeth, though the Verdict doth not find the precile Iſſue.

As if a man bring a Writ of Entry in caſu proviſo, of the Alienation made by the Tenant in Dower to his diſinheritance, and counteth of the Alienation made in Fee, and the Tenant ſaith, that he did not Alien in Manner, as the Demandant hath declared, and upon this they are at Iſſue, and it is found by Verdict, that the Tenant aliened in tail, or for term of another mans life. The Demandant ſhall recover, yet the Alienation was not in manner as the Demandant hath declared, Littleton, Sect. 483. Alienation.

Alſo if there be Lord, and Tenant, and the Tenant hold of the Lord by fealty only, and the Lord diſtrain the Tenant for Rent, and the Tenant bringeth a Writ of Treſpaſs againſt his Lord, for his Cattel ſo taken, and the Lord plead that the Tenant holds of him by fealty and certain Rent, and for that Rent behind he came to diſtrain, &c. And demand Judgment of the Writ brought againſt him Quare vi & armis, &c. And the other ſaith, That he doth not hold of him, in manner as he ſuppoſeth; and upon this, they are at Iſſue. And it is found by Verdict, that he holdeth of him by fealty only, in this caſe the Writ ſhall abate, and yet he doth not hold of him, in manner as the Lord hath ſaid; For the matter of the Iſſue is, Whether Treſpaſs by the Tenant againſt the Lord.

ther the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain, the Tenant for other services which he ought not to have, yet such Writ of Trespass, Quare vi & armis, &c. doth not lye against the Lord, but shall abate. Littleton, Sect. 485.

The Verdict may find the Defendant guilty of the Trespass at another day or place.

Also in a Writ of Trespass for Battery, or for Goods carried away, if the Defendant plead not guilty, in manner as the Plaintiff suppose, and it is found that the Defendant is guilty in another Town, or at another day, then the Plaintiff suppose, yet he shall recover.

Conspiracy.

So the Jury may find the Conspiracy at another day, for the day is but form.

Battery.

In Battery if the Defendant justifie at another day with a Traverse Devant & apres, he may be found guilty at another day.

Son assault Demesn.

If the Defendant by this Plea agree with the Plaintiff in the day, year, and place, and the Plaintiff reply, De son tort demesn sans ties cause, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another day. Rolls. tit. Tryal. 687. Vide devant. cap. 11.

And so in many other cases these words, scil.

ſcil. in manner as the Demandant or the Plaintiff hath ſuppoſed, do not make any matter of ſubſtance of the Iſſue. Littleton. Sect 485.

And 'tis a Rule, That where the Iſſue taken, goeth to the point of the Writ or Action, there Modo & forma are but words of form, as in the caſes aforeſaid.

Modo & forma, when words of form.

But when a Collateral point in pleading is traverſed, as if a Feoffment be alledged by two, and this is traverſed Modo & forma; And it is found the Feoffment of one, there Modo & forma, is material; So if a Feoffment be pleaded by Deed, and it is traverſed Abſque hoc quod feoffavit, Modo & forma, upon this Collateral iſſue, Modo & forma are ſo eſſential, as the Jury cannot find a Feoffment without Deed. Co. Littleton, 282.

When of ſubſtance, & muſt be found by the Verdict.

So in *non aſſumpſit modo & forma*, upon an *Indebitatus aſſumpſit*, there *modo & forma*, were not material. *Secus*, when the Action is upon a Collateral promiſe.

But here is a diverſity to be obſerved, That albeit the Iſſue be upon a Collateral point, yet if by the finding of part of the Iſſue, it ſhall appear to the Court, that no ſuch Action lyeth for the Plaintiff, no more than if the whole had been found, there Modo & forma, are but words of form, as in the aforeſaid caſe of the Lord and Tenant, it plainly appears; for it was all one, whether the Tenant held by fealty only, or by fealty and Rent, becauſe if either was true, the Tenant

Treſpaſs *Quare vi & armis*, lies not againſt the Lord for diſtraining his Tenant, without cauſe.

nant could have no Trespas, Quare vi & armis, against the Lord in that case, by the Statute of Marlbridge. cap. 3. Vide hic Devant.

Jury cannot vary from their Verdict, when it is recorded.

After the Verdict recorded, the Jury cannot vary from it; but before it is recorded, they may vary from the first offer of their Verdict. And that Verdict which is recorded shall stand. 1 Inst. 227. Plo. Com. 212.

Open Verdict and privy Verdict.

There is alls a Verdict given in open Court, and a privy Verdict given out of Court before any of the Judges of the Court, so called, because it ought to be kept secret, and privy from each of the parties, before it be affirmed in Court.

The Jury may vary from a private Verdict.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, shall be adjudged their Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of necessity of Law, but of courtesie of Law for the ease of the Jurors, and in this case, their saying

shall

ſhall not be their Verdict, till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff ſhall be demanded, and then may be non-ſuited: But when they give their Verdict ſecretly, the Plaintiff is not demandable, nor can be then non-ſuited, but he may be non-ſuited, when the Verdict of right ought to be rendred. Ergo, the force is in the giving of the Verdict in the Court, and not elſewhere.

And alſo in the Court it ſelf, if they pronounce their Verdict, they may change it, if they be miſtaken, or it be not full in Law, or for ſome other reaſonable cauſe immediately perceived. Therefore if they may vary, and contradict their firſt Verdict given in open Court. A fortiori upon better adviſement, they may do ſo when their firſt Verd.ct was given out of Court, and they not diſcharged; for they be in the Cuſtody of the Baily, till they be diſcharged in Court. Plo. Com. 211. More 33. Bro. tit. Verdict. 12.

The Jury having once given their Verdict, although it be imperfect, ſhall never be ſworn again upon the ſame Iſſue (unleſs it be in caſe of Aſſiſe, when the party is to recover by view of the Jurors). But there muſt be a Venire facias de novo. Cro. 2. part. 210. Jury ſhall give but one Verdict in the ſame cauſe.

If a Verdict be good in part, and naught in another part, it ſhall ſtand in part, and a Verdict good in part.

new Inquest shall be for the rest. Bro. tit. Verdict. 89.

What permitted in Pleading for the Juries direction in their Verdict.

For the Juries direction in their Verdict, greater liberty is permitted in pleading a matter doubtful in Law; for, a Traverse (for this Reason) may be omitted. As in debt against an Executor, It is a good plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor, without traversing that he is not Executor; for the lay-people know no difference, betwæn one administrating as Executor, and one administrating as Administrator, 9 E. 4. 33.

A Special *non est factum.*

For this Reason likewise, the special matter may be pleaded together with the general Issue, &c. As that the Obligation put in suit, was sealed by him, and delivered to A. to kæp till certain Indentures were made betwæn the Plaintiff and him; before which Indentures made, the Plaintiff took the Obligation out of the possession of A. so is not his Deed. This is good, and yet by this general conclusion, the matter precedent shall not be waved, for it were perillous to put the special matter in the mouth of Lay-people. 9 H. 6. 38.

*Where the Issue upon a collateral Matter is tryed in a foreign County, Hundred, &c. where the Principal and Accessary shall be tryed.

Damages. * In Trespass, if a Release be pleaded in a Foreign County, and tryed there for the Plaintiff, there also shall damages be assessed

assessed by the same Jury. For where the principal is tryed, there also shall the Accessary and incidents be inquired of. I need use no other instances to illustrate this, than the case aboveſaid. 21 Ass. 14.

They may find a Condition to defeat a Frœhold of Land, although it be not pleaded; but of things in grant, they must also find the Déed of the Condition. What things the Jury may find.

Upon Traverse of a Lease Modo & forma, the Jury may find a Lease of another date, although the date be mistaken in the Pleading, but not a Lease made by another, than from whom was pleaded; for this is out of the issue in matter and form. *Modo & forma.*

In an Assise of Rent, the Jury may find that the Rent was granted with an Atturnment, although no specialty be shewed. Rent.

A Fine or Recovery may be found by the Jury, without shewing of it under Seal. The Jury cannot find against what is admitted by the Record. Matter of Record.

They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law. Divorce.

Attainder of Felony not pleaded cannot be found, unless Sub pede sigilli. 26 Ass. 2. Attainder.

The Jury is not to inquire of this which is agreed by the parties.

Power. As in Dower, if the Tenant says he has been always ready to render Dower, and the issue be if the Husband dyed seised, the Jury is not to inquire, if the Estate was dowable; for this is confessed.

Wast. If the Defendant doth not deny the Wast, but Pleads another matter, scilicet nul tiel vill lou, &c. the Jury is not to inquire of the Wast, but give damages although no Wast be made.

Award. In Debt upon a Bond, with a Condition to perform an Award, and the Defendant Plead Nullum fecit Arbitrium, and the Plaintiff reply, fecit Arbitrium, and sets it forth, and the Defendant rejoyn Nul tiel award, the Jury cannot find any matter dehors to make the Award void in Law; which doth not appear within the Award pleaded. As that the release awarded would discharge the Bond of the Submission, for nothing is in issue, but whether such an Award was made in fait as is alledged, neither could this matter be alledged by any Rejoynder; for it would have been a departure from the Plea, and a Jury cannot find that which would have been a departure, because out of their issue. But in this Case, if the Defendant would have took advantage of it, he ought to have Pleaded all this matter in his

Barr,

Barr, and not have ſaid Nullum fecit Arbitrium; for 'tis a departure in the Reſoynder to acknowledge an Award which was denyed in the Plea.

In Debt for 20 s. and the Iſſue be, ſolvit ad diem, and the Verdict be quod debet the 20 s. this is not good, becauſe it is not direct but by Argument. How the Jury ought to find their Verdict, and what ſhall be intended.

In Debt upon an Obligation, if the Defendant ſay, That he is a Lay-man not lettered, and 'twas read as an Acquittance, Et iſſint nient ſon fait, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, becauſe they ought preciſely to find if it was his Deed or not. *Nient lettered.*

If the Iſſue be, whether where a Copyhold is granted to three for the lives of two, if he which dye ſeiſed, &c. ought by Cuſtom to pay a Heriot or not, and the Jury find that there was never any ſuch Eſtate granted in the Manor; this is not good for the reaſons aforeſaid. Cuſtom.

So if the Iſſue be, if by Cuſtom an Eſtate taple may be granted, and the Jury find, that it may be granted in Fee; which is greater, yet 'tis not good.

In Treſpaſs for taking and cutting his Leather, Treſpaſs.

Leather, if the Defendant justifie as a Searcher, and cut it for the better search More scrutatorum, without any other damage; and the Plaintiff reply, De injuria sua propria Absq; hoc, that he cut it, More scrutatorum, upon which Traverse, issue is joyned, and the Jury find that the Defendant cut it as the Plaintiff has alledged; this is no good Verdict, because 'tis not any answer to the issue, but by Argument.

Battery. In Trespass and Battery in A. to find not guilty in A. is not good; for it ought to be generally not guilty.

Riens per Descent. Upon this Plea, if the Plaintiff reply that he hath divers Lands in D. per descent, and the Jury find he had divers Lands by descent, this is good, without finding what; for 'tis not material, in regard upon this false Plea a general Judgment, is to be without having respect to the Assets.

Incertain.

Ejectment. Of 5 Acres, if they find the Defendant guilty in 8 pieces. de terre parcel tenementorum predict, 'tis a void Verdict because uncertain, and no Execution can be made of peices.

Verdict Special. In case upon non Assumpsit Pleaded, if the Jury find that the Defendant non Assumpsit; yet if two Witnesses say true, then we find that he did Assume. The first shall stand for the Defendant, and the last words

are

are void; and Surplusage shall not vitiate. Surplusage.

If upon a Lease of 20 Acres, and the Defendant plead Non dimisit, and the Jury find quod dimisit 10 Acres tantum, and the Conclusion of the Verdict is, Et si, super totam materiam Curiæ videbitur quod Defendant dimisit 20 Acres, then they find for the Plaintiff; and if not, then for the Defendant; this is repugnant, and so the Verdict is void in all. Ejectment.

To Assels Damages, incertainly is void. As to say we Assess 40 l. if we must by Law, if not then but 3 l. this is void. Certain.

Indebitatus assumpsit, to Assels Damages occasione debiti predicti is good, although it ought to be occasione non performationis, &c.

In an Information upon the Statute 39 El. ca. 11. for Dying with Logwood, by which he lost 20 l. for every Offence upon Not guilty, if the Jury find him Guilty for using this against the Statute for 40 days, by which he lost this is not good, because he forfeits 20 l. for every time, and the number of times do not appear. Information.

If the Jury find the words in the Will, and yet do not find the Will, the Verdict is not good.

If

If they first find the Special Matter, and then find the Issue generally, the Special Matter is hereby waved.

Where a Special Verdict shall be good by Intendment.

If the Jury find that J. S. was seised in Fee, and Devised the Land to J. D. although they do not find that the Land was held in Socage, yet this is good; for this shall be intended, this being a Collateral thing, and this being the most common Tenure.

Will.

If they find that he was seised and made his Will in hæc verba, &c. although they do not find that he Devised the Land as in the former; yet this is good by intendment.

But if a thing is left out, and cannot be intended, the Verdict is not good.

If the Issue be whether the Sheriff took J. S. and kept him in Prison in Execution for certain Debt and Damages by force of a Cap. ad Sa. and the Jury find that he took him by force of an alias Cap. ad Sa, &c. although they do not find that he kept him in Execution for the Debt and Damages aforesaid, according to the Issue, yet this is a good Special Verdict; for it shall be intended, for the Consequence is necessary from this which is found, for he could not take him, but that he must be in Execution. Vide several instances of this. Roll. tit. Tryal. 697, &c.

If

If the Jury find that J. S. was ſeiſed in Fæ, and made his Will in hæc verba, and that he afterwards died; although they do not find that he died ſeiſed, yet it ſhall be intended that he died ſeiſed; and ſo good. Will.

If they find that A. did Bargain and Sell, &c. although they do not find any conſideration, yet this ſhall be intended. Bargain and Sale.

So if they find that ſuch perſons Authorizati virtute literarum patentium dominæ Elizabethæ, &c. and do not find that the Letters Patents were under the Great Seal, yet this ſhall be intended. Letters Patents.

Verdicts of Lay-men ſhall be taken according to their intent, and need not ſo preciſe a form as in Pleadings, lib. 4. 65. Hob. 76.

Therefore if the Jury find a Recognizance in nature of a Statute Staple in this manner, That the Conuſor came before R. O. Recorder of London, and T. O. Maior of the Staple, Et recognovit ſe debere to B. 200 l. and do not ſay, Secundum formam ſtatuti, &c. nor Preſcriptum Obligatorium, &c. although the Statute of 23 H. 8. provide, That it ſhall be by Bill Obligatory, ſealed with three ſeals; and here it doth not appear, that there was any Bond or Seal, nor that it was according to the Statute; yet theſe things ſhall be intended, they having found a Recognizance

cognizance before the Maior and Recorder.

Notes. A Special Verdict may be amended by the Notes.

Where a special Conclusion of a special Verdict shall aid the Imperfections of it.

If the Jury find a Special Verdict, and refer the Law upon that special Matter to the Court, although they do not find any title for the Defendant, which is a Collateral thing to the point which they refer to the Court, yet the Verdict is good enough, for all other things shall be intended, except this which is referred to the Court, lib. 5. 97.

In Ejectment, If the Plaintiff declare upon a Lease made by A. and the Jury find a Special Verdict, and Matter in Law upon a power of Revocation of Uses by an Indenture and limitation of new Uses, and then a Lease for years made to the Plaintiff by the Lessor in the Declaration, and another, in which there is an apparent Variance; but they conclude the Verdict, and refer to the Court, whether the grant of a new Estate found in the Verdict be a revocation of the first Indenture, or not. The special Conclusion shall aid the Verdict, so that the Court cannot take notice of the variance between the Lease in the Declaration and Verdict, because the doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the first Indenture, and not of the former

former Uses, and limitation of new Uses, as it ought to be; yet in a Verdict this is good, for their intention appears.

So Note a difference between a special Conclusion and Reference to the Court, and a general Conclusion and Reference to the Court. Vide hic apres.

In Debt for 40 s. for a Horse sold, and the Jury find 40 s. Debt for two Horses sold; this is found against the Plaintiff, for this is not the same Contract. For whom the Verdict shall be said to be found.

So in Debt for 20 l. if the Jury find 40 l. Debt, this is against the Plaintiff.

In Debt for 20 l. for Wood sold, and the Jury find the Bargain was for 20 Marks; the Plaintiff shall not have Judgment for this Variance.

So in Debt for Rent upon a Demise of two Acres, and the Jury find it upon the Demise of one Acre, the Plaintiff shall not have Judgment.

But in Debt for 24 l. 8 s. received for the Plaintiffs Use, if the Jury find the Defendant owes 24 l. but not the 8 s. the Plaintiff shall have Judgment; for perhaps he had paid the 8 s.

In an Action upon the Case against A. if the Plaintiff declares, That by Custom, &c. amongst Merchants, &c. If two are found in Arrearages upon Accompt, and they assume to pay this at certain Days, that any one of them may be charged for the whole by himself, and then shews the Accompt of A. and B. who were found in Arrear, in so much, &c. and promised to pay this at certain days, but paid it not, and now he brings his Action against A. although upon non Assumpsit pleaded, it be found that the days of payment are mistaken, yet the days being past, the Action lyes, because the Law makes the Duty upon the Accompt; for which after the days an Action lyes.

Damages. Where all is to be given in Damages, the Jury are Chancellors, and may give so much as the Case requires in Equity.

Detinue. In Detinue of a Bond of 100 l. if the Jury find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant.

Promise. So in a promise to do two things, if the Jury find but one of them, 'tis for the Defendant.

Ejectment. Otherwise in Ejectment upon a Demise of 10 Acres, if the Jury find a Demise of less, the Plaintiff shall have Judgment.

If

If the Iſſue be upon a Preſcription, for Common belonging to a Meſſuage, and 200 Acres of Land, 50 of Meadow, and 50 of Paſture; if the Jury find Common belonging to the Houſe 20 Acres of Meadow, and 20 of Paſture in two of the Mills, and not in the reſt; the Preſcription is not found. Preſcription.

If part of the Treſpaſs or wrong be found 'tis ſufficient, in Treſpaſs or an Action of the Caſe upon a Tort; as by a Commoner for putting and depaſturing Cattel in the Common. Treſpaſs. Caſe.

If the Iſſue be whether all the Lands in Execution, were the Eſtate of the Father in Tail, or in Fee, and part is found in Tail, and part in Fée; Judgment ſhall be given for the Defendant who pleaded the Seiſin in Fée. *Audita Querela.*

If the Plaintiff declares upon a Demiſe made the firſt of May to Commence at Michaelmas next, if the Jury find a Leaſe made at any other day before the Feaſt, 'tis found for the Plaintiff; for the day of making is not material. Ejectment.

Otherwiſe of a Leaſe for years in Poſſeſſion; As of a Leaſe made the 5th of May Habend for three years from Lady-day before; and the Jury find a Leaſe made the 15th day of May for three years, from the ſame

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ſame Lady-day; for this is a Leaſe in Poſſeſſion.

Impriſonment. In falſe Impriſonment in Middleſex, and the Defendant juſtifie in London, to which the Plaintiff ſaith, the Defendant took him in Middleſex de ſon Tort demeſn, and Iſſue upon this, and the Jury find the Defendant took him in Middleſex lawfully upon a Writ, yet this is for the Plaintiff; for the Iſſue is upon the place, and not upon the Tort, for that is confeſſed by the Pleading, if the taking was in Middleſex.

Debt. In Debt for 20 l. and the Jury find 40 l. the Plaintiff ſhall not have Judgment, the reaſon ſæms to be becauſe it cannot be the ſame Debt which is intire, but upon another Contract, which is miſlaid.

Audita Querela. If the Iſſue be Payment after Execution, and the Jury find payment before, yet the Iſſue is proved; for payment before, is payment after.

Obligation. In Debt upon a Bond bearing date the 25 of June upon Non eſt factum, if the Jury find it his Deed, but that it was delivered 8 days after the date, this is found for the Plaintiff.

Joynt and ſeveral. If the Iſſue be that two made the Feoffment, or two were Churchwardens, &c. and the Jury find but one, &c. the Iſſue is not found.

If

If the breach of Covenant or Waſt be aſſigned in cutting 20 Trees, and the Jury find but 10; yet the Plaintiff ſhall have Judgment. Obligation. Covenant. Waſt.

If in Replevin, &c. the Jury find that part of the Cattel were Levant and Couchant, and part not, and the Iſſue is upon all, the Iſſue is not found. *Totum & Pars.*

In Ejectment for him who pleaded all, of 14 Acres, and the Jury find guilty of 20, the Plaintiff ſhall have Judgment for the 14, and the Verdict is void for the reſidue. Ejectment. Void in part.

In an Information upon an uſurious Contract by two, 'tis not ſufficient to find a Contract by one. Otherwiſe where the Tort and offence is ſeveral, as againſt two upon the Statute 4 E. 6. Pro emptione butiri, and ſelling it by Retail, &c. and ſo in an Action upon the Caſe in Nature of Conſpiracy, and for words laid twice in one Declaration This will put in Iſſue the manner as well as the matter, where the manner is material; as the time of the Fact, and other Circumſtances. Information. Uſury. *Modo & forma.*

The Plaintiff replies, That W. made a Leaſe to him 30 Martii Habend. from Lady-day laſt, and Iſſue Modo & forma, and the Jury find a Leaſe made the 25 Martii, Habendum, Extunc for a year, this is good, although Replevin. Leaſe.

although the time of making, and Commencement of the Leale are mistaken, inasmuch as Extunc includes the Feast. Yet because a sufficient Title and Leale is found for the Plaintiff to put in his Cattel, this is sufficient, this being the substance, and the Modo & forma shall not put the Circumstances in Issue.

So in Trespass, if the Defendant justifie the putting in his Cattel for Common which he Claims from Pentecost to a certain time every year, which is traversed Modo & forma, and the Jury find that he had Common in Vigilia Pentecostis in festo, and the day next to this, to the time, this is found for the Defendant.

But otherwise in these Cases in an Assise of Common, because there he ought to recover his Title.

In Debt for Rent, if the Defendant plead an Entry by the Plaintiff before the Rent was due, scilicet such a day which was after, and Issue upon the Entry Modo & forma, and the Jury find for the Defendant, he shall have Judgment, for the scilicet is void, and the Modo & forma go to the matter. See after.

Non est factum. In Debt upon a Bond, and the Defendant plead Non est factum, and the Jury find

find the Bond made joyntly by another with the Defendant, the Plaintiff shall have Judgment; for the Defendant should have pleaded this.

If a Devise be pleaded Absolute, if the Jury find a Devise upon a Condition Precedent, 'tis not good. Devise.

In Debt against A. as Daughter and Heir to B. and the Defendant plead Riens per discent of B. and the Jury find that B. was seised in Fee and dyed, having Issue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive; and dyed one hour after, this Issue is found against the Plaintiff, because the Defendant had the Land as Heir to her Brother who was last seised, and not to the Father, and so the Defendant had not the Land by Discent from the Father, but from the Brother, and yet this is Assets in her hands if it had been specially pleaded. *Riens per Discent.*

In a Writ of Error brought by him in remainder in Tail to reverse a Fine, if the Defendant plead in Barr of the Writ of Error a Common recovery by the Tenant in Tail, to which the Plaintiff replies; That at the time of the Recovery suffered, he himself was Tenant to the Præcipe, and so the Recovery void, Upon which Issue is joyned, and the Jury find that he was Tenant of Error. Part.

part, but not of other part. This Issue is partly found for the Plaintiff, and partly for the Defendant, so the Court shall proceed to the Examination of the Error; for that whereof he was found no Tenant; but 'tis a good bar of the Writ of Error, for that whereof he is found Tenant to the Præcipe.

Promise. In Assumpsit to pay Money upon request, and issue upon this, if the Jury find the Plaintiff promised to pay the Money, but do not say upon request, nor Modo & forma, 'tis not found for the Plaintiff.

If the Substance of the Issue be found, 'tis sufficient Manner. In Ejectment of a Manner, if the Jury find that there were no Freeholders, and so 'tis no Manner in Law, yet being a Manner by Reputation, and so the Tenements pass by the Lease, Therefore this Verdict is found for him who pleads the Lease of the Manner, for the substance is, whether any thing was demised or not.

Goal. In an Information of Extortion against the Gaoler of the Goal, a Prison of the Castle of Maidston; the Jury found there was no Castle, but that there was a Goal; this was for the Plaintiff, because Goal is the Substance.

Accompt. If the Issue be whether the Defendant had Accompted before R. and W. Auditors assigned

aſſigned by the Plaintiff, and the Jury find an Accompt before R. only, the Iſſue is found for the Defendant; for the Accompt is the effect of the Iſſue. Vide Rolls tit. Trial. 707. &c.

If 11 agrée, and the 12th will not, the Verdict of the 11 cannot be taken, but the Court may carry the Jurors with them in Carts until they are agréed. 41 Aſſ. 11. Jury agree.

A privy Verdict may be altered in open Court. Verdict altered.

In an Extendi fac. upon a Statute, if the Jury deliver their Verdict in Writing, they may afterwards make it more formal, but they cannot alter it in ſubſtance; for it is a compleat Verdict by the delivery. So of Preſentments, &c.

A Fine pleaded in Barr, and that after the death of A. ſcil. 1 Auguſt 3 Car. B. Father of the Plaintiff was alive, & in plena vita & remanſit infra hoc Regnum infra quatuor Maria, &c. apud W. in Com. D. and no Entry or Claim within five years after, and the Plaintiff replies, and takes Iſſue, que il non fuit & remanſit infra hoc Regnum Angliæ modo & forma, &c. And the Jury find quod non fuit & remanſit infra hoc Regnum Angliæ, 1 Auguſt 3 Car. but that he was there 1 Maii 4. Car. and remained there a Fine and Non-claim. *Modo & forma.*

Month, and refer to the Court Au fuit & remanſit infra hoc Regnum modo & forma, &c. This Iſſue is found for the Defendant, for the matter and ſubſtance of the Plea is, whether he was within the Realm after the death of A. and five years before Entry or Claim per him or the Plaintiff, and modo & forma ſhall not make the day material. Roll. tit. Trial. 713.

Judgment, Arreſt, at what time.

Judgment upon a Demurrer, and a Writ of Inquiry executed at the return, the party may ſhew any thing in Arreſt of Judgment; for Judgment is not compleat until the laſt Judgment. The firſt is but an Award, A man may plead any thing in Arreſt of Judgment after a Verdict, which will make Error if the Judgment be given.

In Debt upon a ſimple Contract againſt an Executor, if he will not plead in Abatement, but other Matter which is found againſt him, he ſhall not afterwards alledge that he is not chargeable in Arreſt of Judgment.

So in Debt againſt Executors upon Arrearages of Accompt, where they are not chargeable.

What may be alledged.

That which appears ill upon the ſame Record, but not a matter of Fact, which doth not appear upon the Record, becauſe the parties cannot

cannot by the Iſſue. As that a Juror was challenged, and yet ſerved on the Tales, for this cannot appear without alledging matter of Fact. Nor that the Defendants Attorney had no Warrant. But if there be any irregular or foul practice, this may be offered to ſet aſide a Judgment.

If any thing be omitted in the Declaration, or if more be put into the Declaration than is found by the Jury; if it make a material Variance betwixt the Nar. and the Verdict, the Action ſhall abate. Variance between the Verdict and the Declaration.

Theſe following are adjudged material Variances.

If the Declaration be for theſe words, Thou procuredſt eight or Ten of thy Neighbours to Perjure themſelves, and the Jury find that he ſaid, Thou haſt cauſed eight or 10, &c. for he might be a remote Cauſe, ſcilicet cauſa ſine qua non, without Procurement. Nar. He is a Bankrupt. Verdict. He will be a Bankrupt within two days. Nar. He is a Thief. Ver. He ſtole a Horſe. Nar. Thou art a Murderer. Ver. He is, &c. Nar. I know him to be a Thief. Ver. I think him to be a Thief. Words.

So it is a material Variance, if a ſpecial Promiſe be laid to be upon Requeſt, and the Verdict find it without Requeſt. So if the Promiſe.

Decla-

Declaration be upon a Leaſe, made by two, or by Baron and feme, and the Jury find that one of them had nothing in the Land, or that the Baron only made the Leaſe, or that the two were Tenants in Common, and ſo ſeveral Leaſes, otherwiſe if they were Coparteners.

So in Caſe that the Teſtator was indebted to the Plaintiff in 55 l. and the Defendant being Adminiſtrator in conſideratione, &c. Promiſe to pay this upon non Aſſumpſit, if the Verdict find the Promiſe to be to pay 30 l. part of the 55 l.

Eje&ment. So in Eje&ment, If the Nar. be of a Leaſe of three Acres, a Leaſe of a Moiety will not maintain the Nar.

Waſt. So in Waſt, for Cutting Trees, and the Verdict find that he eradicated the Trees, but did not cut them.

Preſcription. A Preſcription in modo decimandi, That every one who hath ſeven Lambs, or under ſeven, ſhall pay to the perſon ob. for every Lamb, and the Jury find that, and further, That if he had more than ſeven Lambs, he ſhould pay a Lamb; and that the Parſon ſhould pay the Pariſhioner ob. This is not the ſame Preſcription, but makes a Variance.

But

But if there be a Variance betwæn the Verdict and the Nar. either by way of Surplus or Defect; but if this matter of Variance be not material in the extenuation of the Action or Damages, the Action shall lye notwithstanding the Variance. Variance.

These ensuing are adjudged not to be material.

Nar. Strong Thief. Verdict. Thief. Nar. I say, &c. Ver. I affirm, or I doubt not. Nar. The Plaintiff will do such a thing. Ver. I think in my Conscience he will, &c. Nar. Of a Lease by a Parson for five years; if he tam diu should be Parson & tam diu viveret. And the Verdict find the Lease to be for five years, if he tam diu viveret without the words, and should continue Parson; for the Law implyeth, That if he be deprived or resign, that the Lease Determines. Nar. He is a Murderer. Ver. He was a Murderer; for when he says, He is a Murderer, 'tis not intended, that he did the Act in presenti, but before. So in Trespasses or Actions upon Torts and wrongs which are several. If the Verdict find part, 'tis no material Variance; and the Plaintiff in these Cases shall have Judgment, Roll. tit. Tryal. 720.

A Jury of Middlesex was demanded in the Common-Pleas, the first day of the Term, and Enquest by default.

and some appeared, and some not, so that there was not a full Jury, and neither the Defendant, nor his Attorney did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by default; and by the opinion of Welsh and Dyer, his prayer shall be granted, and the Custos Brevium, and all the Prothonotaries said the course was so; for the parties are demandable before the Jury, and if the Plaintiff make default, he shall be non-suited; and if the Defendant make default, the Jury shall be awarded by default, whether they appear or not. Dyer 265.

What the Defendant looses by his default.

Where an Inquest is taken by default, the Defendant shall loose his Challenges, and by 28 Ass. p. 42. tit. Enquest in Fitz. he shall loose his Evidences also. Bro. Enquest 10. quod non est lex.

When the Defendant may be condemned by default, and when an Enquest must be taken upon the default.

Det. The Defendant pleaded a Release, and the Plaintiff replyed non est factum, and at the day of the Venire facias, the Defendant made default, and the Inquest was taken upon his default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; And yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his default before the taking of the Verdict, Et sic vide, folly in le Plaintiff. Bro. Ib. 5. But upon such Release, and default in Trespass, the Enquest shall be taken by default, and the Defendant shall not be condemned by

default,

default, though the Plaintiff pray it, and the reason is, because the debt is certain, and the damages are incertain in Trespass, Bro. Ib. 3.

And Finch, fo. 409 hath well collected out of Brook, That always in an Action of Trespass, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Accompt, and the rest which are for things in certainty, if the Issue be taken upon a matter in fait only, as payment, or that an Acquittance pleaded in Barr by the Defendant, was made by Dures, &c. The Inquest shall be taken by default, if the Defendant makes default, But in the last recited Actions of Debt, &c. If the Issue be upon the Acquittance it self, Release, or other matter in writing, the Plaintiff may pray Judgment upon the Defendants default, if he will; but if he do not pray it, the Jury shall be taken by default, as in an Action of Trespass.

The Jury may give a Verdict without testimony, or against testimony, when they themselves have Conuzans of the Fact. Plo. Com. 86. Verdict without, or against testimony.

CAP. XIV.

How the Jury ought to demean themſelves, whil'ſt they conſider of their Verdict; when they may eat and drink, when not; What Miſdemeanor of theirs, will make the Verdict voyd; Evidence given them, when they are gone from the Barr, ſpoils their Verdict: For what the Court may fine them, and where the Juſtices may carry them in Carts, till they agree of their Verdict. An Amercement Affered by the Jury.

Jurors ought not to eat or drink.

THere is a Maxime, and an old Cuſtom in the Law, that the Jury ſhall not eat, nor drink, after they be ſworn, till they have given their Verdict, without the Aſſent and Licence of the Juſtices; and that is ordained by the Law, for eſchewing of divers inconveniencies, that might follow thereupon; and that eſpecially, if they ſhould eat or drink, at the Coſts of the parties; and therefore if they do ſo, it may be laid in Arreſt of Judgment. But

But with the assent of the Justices, they may both eat and drink; as if any of the Jurors fall sick, before they be agréed of their Verdict, so soon that he may not commune of the Verdict, then by the assent of the Justices, he may have meat or drink, and also such other things as be necessary for him; and his fellows also at their own costs, or at the indifferent costs of the parties, if they so agrée, or by the assent of the Justices, may both eat or drink: and if the Case so happen, that the Jury can in no wise agrée in their Verdict; as if one of the Jurors knoweth in his own Conscience, the thing to be false, which the other Jurors affirm to be true, and so he will not agrée with them, in giving a false Verdict, and this appeareth to the Justices by Examination, the Justices may in such case, suffer the Jury to have both meat and drink for a time, to see whether they will agrée. And if they will in no wise agrée, the Justices may take such order in the matter, as shall seem to them by their discretion, to stand with reason and conscience, by awarding of a new Inquest, and by setting fine upon them, that they shall find in default, or otherwise as they shall think best, by their discretion; like as they may do, if one of the Jury die before the Verdict, &c. D. and Studen. 158.

For by assent of the parties they may eat and drink. *Br.* Jurors.

New Inquest when the Jury cannot agree.

If the Jury after their Evidence given unto them at the Barr, do at their own Char-

Where, if the Jury eat or drink, it ſhall avoid the Verdict, and where only fineable.

ges eat or drink, either before or after they be agreed on their Verdict, it is finable, but it ſhall not avoid the Verdict; But if before they be agreed on their Verdict, they eat or drink at the charge of the Plaintiff, if the Verdict be given for him, it ſhall avoid the Verdict: But if it be given for the Defendant, it ſhall not avoid it; Et ſic è converſo. But if after they be agreed on their Verdict, they eat or drink at the charge of him, for whom they do paſs, it ſhall not avoid the Verdict. 1 Inſt. 228.

To give the Jury money, makes their Verdict void by two Juſtices. Leon. 1 part 18.

What delivered to the Jury after Evidence, ſhall avoid their Verdict.

If the Plaintiff after Evidence given, and the Jury departed from the Barr, or any for him, do deliver any Letter from the Plaintiff, to any of the Jury, concerning the matter in Iſſue, or any Evidence, or any eſcrowle touching the matter in Iſſue, which was not given in Evidence, it ſhall avoid the Verdict, if it be found for the Plaintiff; but not, if it be found for the Defendant, Et ſic è converſo. But if the Jury carry away any Writing unſealed, which was given in Evidence in open Court, this ſhall not avoid their Verdict, albeit they ſhould not have carried it with them. Ib.

By the Law of England, a Jury after their Evidence given upon the Issue, ought to be kept together, in some convenient place, without meat or drink, Fire or Candle, (which some Books call an Imprisonment) and without speech with any, unless it be the Bayliff, and with him only, if they be agreed. After they be agreed, they may in causes betwen party, and party, give a Verdict, and if the Court be risen, give a privy Verdict before any of the Judges of the Court, and then they may eat and drink, and the next morning in open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in Criminal cases of life or member, the Jury can give no privy Verdict, but they must give it openly in Court.

How the Jury ought to be kept by the Bayliff.

When they may eat and drink. See *Smith*'s Commonwealth. 74.

Where there can be no privy Verdict.

Neither can a Jury sworn and charged in case of life, or member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be nonsuit, for he is in Judgment of Law ever present in Court; but a common person may be nonsuit. And in Civil Actions, the Justices upon cause, may discharge the Jury. Br. Enquest. 68. 47. 39. &c.

Where the Jury cannot be discharged before Verdict.

The King cannot be nonsuit.

But this is against Common practice, and I have known, that after a Jury of Life and Death have been sworn and charg'd with Prisoners Arraigned, the Judge having been credibly

credibly Informed, That it was a Jury pack'd to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently.

In Hillary Term, Sexto H.8. Rotulo 358. It was alledged in Arrest of the Verdict at the Nisi prius, that the Jurors had eat and drunk: And upon Examination, it was found, that they had first agreed; and that returning to give their Verdict, they saw Rede Chief Justice in the way, going to see a fray, and they followed him, Et in veniendo viderunt cyplum,& inde biberunt. And for this, every one of them was fined 40 d. And the Plaintiff had Judgment upon the Verdict. Dyer 37.

Jurors fined.

And Dyer 218. At the Nisi prius, the Jury after their charge given, returned and said, That they were all agreed except one, who had eat a Pear, and drunk a draught of Ale, for which he would not agree; And at the Request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff. And the matter aforesaid being examined by the Oath of the Jurors Seperatim, and the Bayliff who kept them, and found true, the offender was committed, and afterwards found Surety for his Fine. Si, &c. And Fitzherbert, the then Justice of Assise, gave him day in banco, &c. at which day a Fine of 20 s. was there assessed.

Jurors at the *Nisi prius*, fined in bank, for eating Pears, and drinking Ale.

aſſeſſed. Et quoad Ball: Curia aviſare vult.

In Treſpaſs by Mounſon againſt Weſt. the Jury was charged, and Evidence given, and Jurors being retired into a Houſe, for to conſider of their Evidence, they remained there a long time without concluding any thing, and the Officers of the Court who attended them, ſeeing their delay, ſearched the Jurors, if they had any thing about them to eat; upon which ſearch it was found, that ſome of them had Figgs, and others Pippins, for which the next day, the matter was moved to the Court, and the Jurors were examined upon Oath: And two of them did confeſs, that they had eaten Figgs before they had agreed of their Verdict, and three other of them confeſſed, that they had Pippins, but did not eat of them; and that they did it without the knowledge or will of any of the parties. And afterwards the Court ſet a fine of 5 l. upon each of them which had eaten, and upon the others which had not eaten 40 s. But upon great advice and conſideration had, and conference with the reſt of the Judges, the Verdict was held to be good. Notwithſtanding the ſaid miſdemeanor. Leon. 1. part 133. Fined for having Figgs and Pippins about them.

And ſee the Book of Entries, 251. The Jurors after they went from the Barr, ad ſeipſos, of their Verdict to adviſe, Comederunt quaſdam ſpecies, ſcil. Raiſins, Dates, &c. Fined for eating Raiſins and Dates.

at

at their own Costs, as well before, as after they were agreed of their Verdict. And the Jurors were committed to prison, but their Verdict was good, although the Verdict was given against the King.

Finable for having sweet-meats, &c. about them, though they do not eat them. See *Plo. Com.* 519. One fined, and imprisoned for having *Sugar-Candy* and *Liquorish* about him.

In Ejectione firme, it was found for the Defendant, three of the Jurors had Sweet-meats in their Pockets, and those three were for the Plaintiff, until they were searched, and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or not, they were finable for having of the Sweet-meats with them, for that is a very great misdemeanor. Godbolt 353.

Jurors carted.

40 Assise. Placito 11. The Justices said, That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The same Evidence given to the Jury, after they were gon from the Barr, spoils the Verdict.

The Jury were gone from the Barr, to confer of their Verdict, and one of the Witnesses before sworn on the Defendants part, was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. And complaint being made to the Judge of the Assises of this misdemeanor, he examined the Enquest, who confessed all the matter, and

that

that the Evidence was the ſame in effect, that was given before, Et non alia nec diverſa. And this matter being returned by the Poſtea, the Opinion of the Court was, That the Verdict was not good, and a Venire facias de novo was awarded. Cro. laſt part, 189.

Trin. 1653. betwæn Wells and Tayler, Copies of a Bill, Anſwer, and Depoſitions were proved, but not all read and delivered to the Jury, who carried them with them from the Barr, in a bundle, which they layd by them and did not lok on; yet their Verdict at the Barr, was ſet aſide for this Cauſe, and the Court would not regard their ſaying that they did not read them, for they might ſay that to ſave themſelves; it being a faule to take any thing without the Courts knowledge.

If one of the parties ſay to the Jury after they are gone from the Barr, You are weak men, it is as clear of my ſide as the Noſe in a man's face, This is new Evidence; for his affirmation may much perſwade the Jury, and therefore ſhall quaſh the Verdict. If a party ſpeak to them.

So if any thing be read to them, which they ought not to have with them, as a lok of Depoſitions, ſome whereof were read in Evidence. Pratt's Caſe, 21 Jac.

Escrowle delivered to a Juror, before he was sworn, *Vitiates* the Verdict.

The Plaintiff delivered an Escrowle to a Juror impanelled, before he was sworn, who afterwards being sworn, and gone with the Jury from the Barr, to consider of the Verdict, shewed the same Escrowle to his Companions, who found for the Plaintiff. The Minister who kept the Enquest, informed the Court hereof, and the Jury being examined, confessed the matter aforesaid, upon which Judgment was stayed; for after the Jury are sworn, they ought not to see, nor carry with them any other Evidence, but what was delivered to them by the Court: Afterwards the Plaintiff said, That the Escrowle proved the same Evidence, which was given to them at Barr by him; wherefore it was not so bad, as if it had been new Evidence not given before: Sed non allocatur. 11 H. 4. 17.

Church-Book delivered to the Jury, act of Court.

Pasche 38 Eliz. Inter Vicary & Farthing, at the Nisi prius. The Issue was about Non-age, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the assent of parties, and afterwards, the other was delivered to the Jury out of the Court by the Solicitor of the Plaintiff, without the assent of the Court, and a Verdict for the Plaintiff, and this was indorsed on the Postea; The Question was, whether this should make the Verdict void or no, for the Justices differed in opinion, Popham and Gawdy, that it

it ſhould not; Fenner and Clench, that it ſhould; the Negative Juſtices gave theſe Reaſons; That the Book was delivered in Evidence in the Court, and ſo the other party might anſwer to it, and that the Court had informed the Jury of the validity thereof, how far they were to believe it, with many other Reaſons: But the Affirmative was urged, becauſe there might be ſome matter in this Book, to induce them otherwiſe than was intended before, and becauſe it was delivered on his part, for whom the Verdict paſſed, without the Courts aſſent; yet one Book (ſcil. Cro. laſt part 411.) tells us, Judgment was afterwards given for the Plaintiff; ſee More's Reports 452. The Books differ; for Cro. makes Clinch give his opinion for the Verdict. But More brings him on the other ſide, which I conceive is trueſt; and for my part, I know no reaſon, why foiſting of Evidence to the Jury without the Court, ſhould have any favour at all.

Conſider the Reaſons in the former caſes.

In the Caſe of Taylor and Webb, Trin. 1653, B. R. Twiſden moved to ſet aſide a Verdict given at Barr, becauſe that after Evidence when the Writings were delivered to the Jury, ſome Writings which were not ſealed (and therefore ought not to be delivered to the Jury) were delivered by a ſtranger to the Jury.

Hales Counsel of the other side, produces an Affidavit of the Foreman's of the Jury, that they made no use of them in giving their Verdict, and that most of those Writings were read in Court in Evidence upon the Tryal, and Hales said, That if this should avoid the Verdict, then that would be in the power of any Stranger unknown, and against the mind of the parties to avoid any Verdict.

Roll. Ch Just. The Affidavit of the Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) parties, and have offended, and shall not be allowed by their own Oath to take off their offence, and it is the Duty of the Jury to look what Writings they receive before they go from the Barr; and if any such Paper be wrap'd up among other Papers delivered to them by the Court, so soon as they have discovered it, they should call in the Tip-staff, who keeps them, and deliver it to him, and to testifie they made no use of it; and he said it would be dangerous to give the least way to the delivering of any Writings to a Jury.

And at another day Roll cited 11 H. 4. 18. the Plaintiff (before the Tryal) delivered a a breviate of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided, So

Mich.

Mich. 31 Eliz. C. B. Metcalfe and Dean, After the Jury were gone from the Barr, they ſent for one of the Witneſſes, and re-examined him, who gave the very ſame Evidence that he had before given in Court, yet the Verdict was avoided; and the reaſon of both is, a fear and jealouſie that other matters might be given, &c.

37 Eliz. Farthing's Caſe, a Paper not under Seal, which was given in Evidence was delivered to the Jury, this did not avoid the Verdict, becauſe here can be no ſuch fear; and per Roll, If any Writing (though not given in Evidence) be delivered to the Jury by the Court, it ſhall not avoid the Verdict. And in the principal Caſe the Verdict was avoided.

Hill. 40 Eliz. Rot. 847. In Arreſt of Judgment after Verdict, it was alledged, that a Juror delivered to his Companions, an Eſcrowle for Evidence to them, which was not given in Evidence at the Tryal, and adjudged no cauſe to Arreſt Judgment, unleſs it had been received from one of the parties, which did not appear. More 546. but otherwiſe, if it had been given by a party, and the Jury had found for him.

Eſcrowle from one who was no party.

In the Caſe of Duke and Ventres, Mich. 1656. B. R. tryed at Barr, one Mr. Beverly of Suff. a Barriſter was returned of the Jury,

Jury, who (having been at a Tryal of the same Cause above 20 years before in the Cheq. and heard there great Evidence to make a Deed fraudulent, which was now the Contest) demanded of the Court, whether he ought to inform the rest of the Jury privately of this, or conceal it, or declare it in open Court? The Court ordered him to come into Court, and deliver all his knowledge which he heard then proved (which Evidence was not now given, because the parties were dead) and so he did, being not sworn again, but only upon the Oath taken as a Juryman.

And certainly, It is of dangerous Consequence, to receive a Verdict against Evidence given, on suppolal that some of the Jury knew otherwise, or on private Information given by one Juryman to the rest, where he can't be Cross-Examin'd; and let such Jurors beware of Attaint, but the best way is (as before) in open Court.

In a Writ of Error, the first Error assigned was, that Termino Trin. twelve Jurors, and no more, did appear: This ex assensu partium, was adjourned until Crastino Animar. on which day, two others came in and were sworn, being of the first Pannel.

Jury adjourned.

The

The Court all clear of Opinion, that this is no Error, this being good enough, they being all to be called again. Leon. 3. part 38.

If a Juror depart after he is ſworn, he ſhall be fined and impriſoned, and by aſſent of parties, another Juror may be ſworn. Bro. Jurors 46 lib. 5. 40. Juror depart.

If a man be non-ſuited after the Jury is ready to give their Verdict, the Court may cauſe the Amercement of the Plaintiff to be preſently aſſered by the Jurors. li. 8. 39.

CAP.

CAP. XV.

What Puniſhment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of *Embraceors*. *Decies tantum*. Attaint: ſeveral Fines on Jurors. What Iſſues they forfeit, and of Judgment for ſtriking a Juror in *Weſtminſter*, &c.

YOu have already heard how the Court may fine the Jurors for their miſdemeanors in giving up their Verdict, I will proceed in ſhewing what puniſhments they are lyable unto, if they neglect their duty; and doubtleſs, no men have more need of knowing what penalties the Law inflicts on their offences, then common Jurors, who too often being preingaged with favour to the Plaintiff, or malice againſt the Defendant, Et ſic è converſo; or with common Intereſt, (as they call it) where Tythes or Commons are in queſtion, will neither hearken to their Evidence, nor direction of the Judge. But ſubvert the whole drift of the Common Law, which will have them of the Neighbour-hood, where

where the fact was committed, to the end, that they knowing most of the fact, may consequently give the best Verdict; yet contrariwise, Jurors which live nearest, do now a days, most commonly so fetter themselves with favour or animosities to the parties, that those which live furthest off (as Juries from other Counties) for the most part, give the cleanest Verdicts. And how should the Judges remedy this mischief, but by severely punishing those Juries which offend; the Law in this will be their Guide; for without doubt, (excepting life and member) the Law hath provided more severe punishments against Juries, than against any other offendor whatsoever; as well knowing that corruptio optimi est pessima: And common Jurors generally have nothing to do with this verse, Oderunt peccare boni, virtutis amore, Therefore 'tis fit they should be concerned in the next, Oderunt peccare mali, formidine poenæ; wherefore the description of what this poena is, shall be the conclusion of this Treatise.

If any Juror take a reward to give his Verdict, and be thereof attainted, at the suit of other than the party, and maketh fine, he which sueth shall have half the fine, and if any of the parties to the Plea, bring his Action against such Juror, he shall recover his damages. And the Juror so attainted shall have imprisonment for one year, which

The penalty of Jurors taking Rewards.

imprisonment shall not be pardoned for any fine, this is by the Statute of 34 E. 3. cap. 8.

Shall not serve of any other Inquest.

5 E. 3. ca. 10. It is accorded, That if any Juror in Assises, Juries or Enquests, take of the one party, or of the other, and be thereof duly attainted, That hereafter he shall not be put in any Assises, Juries, or Enquests; and nevertheless, he shall be commanded to prison, and further ransomed at the Kings will. And the Justices before whom such Assises, Juries and Enquests, shall pass, shall have power to enquire and determine according to this Statute.

Imprisoned and ransomed, (that is) fined.

A man would think that these Statutes should have frighted any Juror from taking Rewards to give his Verdict. But

——Quid non mortalia pectora cogis
Auri sacra fames?

So sacred is this love of Money, that Conscience her self must vail to it, and not stand in competition with such allurements: wherefore the Law did redouble its force; nay more, produced a Decies tantum, scil. That a Juror taking reward to give his Verdict, shall pay ten times so much, as he hath taken; which forfeiture, methinks, should make even those

those who love Money best, refuse to take Money upon such an account, because it is like a Canker in their Estates, depriving them in the end, of ten times more than it brought; for which, hear the Statute 38 E. 3. cap. 12.

Item, As to the Article of Jurors, in the 24th year, it is assented and joyned to the same, that if any Jurors in Assises sworn, and other Enquests to be taken betwæn the King and party, or party and party, do any thing take by them or other of the party, Plaintiff or Defendant, to give their Verdict, and thereof be attainted by process contained in the same Article, be it at the suit of the party that will sue for himself, or for the King, or any other person, every of the said Jurors, shall pay ten times as much as he hath taken. And he that will sue, shall have the one half, and the King the other half. And that all Embracers, that bring or procure such Enquests in the Country, to take gain or profit, shall be punished in the same manner and form as the Jurors. And if the Juror or Embracer so attainted, have not whereof to make agrée, in the manner aforesaid, he shall have the imprisonment of one year: And the intent of the King, of Great men, and of the Commons is, That no Justice, or other Minister, shall enquire of office, upon any of the points of this Article, but only at the Suit of the party, or of other, as aforé is said. Decies tantum. Embracer.

Upon which Statute, there is a Writ called a Decies tantum; and who will, may bring it, for it is a popular Action, and lies (as you see) where any of the Jurors, after he is sworn, taketh of one party, or of the other, or of both (and then he is called an Ambidexter) any Reward to give his Verdict, &c. And it may be brought against all the Jurors and Embracers, although they take several Sums of Money: and although the Jury give no Verdict, or a true Verdict. But it doth not lye against an Embracer, if he taketh no Money, and imbraces, or taketh Money, and doth not imbrace. See Bro. Tit. Decies tantum 13. and F. N. Br. 171.

Ambidexter.

So F. N. Br. saith. But for my part, I think he is mistaken, for the Statute mentioneth nothing of his taking money; and in my opinion, the case of 37 H. 6. 13. is full against him.

An Embraceor, is he that procures the Jurors in the Country, to take gain or profit, or comes to the Barr with the party, and speaks in the matter, or stands there to survey the Jury, &c. or to put them in fear, or solicits them to find on the one side or other; and this Fellow cloaks his Embracery, under pretence of labouring the Jurors to appear, & to do their Conscience: And thus the Attorneys in the Country, often take upon them to do, and many times put in a word or two for their Clyents; which practice deserves the most severe punishment, next to their getting the Sheriff to return such and such in the Jury; which they, having been Under-Sheriffs themselves, and so agree with one another, are most expert at.

Embraceor.

Attorneys ill practice.

But

But it was said by Roll. Ch. Just. That a Plaintiff might well intreat one Juror to appear, and that it was allowed in the Star-Chamber, but a Stranger could not labour one Juror to appear.

But Counsellors at Law, may plead for their Money at the Barr; But they must not labour the Jury privately; and if they take Money for this, they are Embraccors. F. N. 6. Br. 171. Counsellors.

So much doth the Law hate, that Jurors should privately take Money for their Verdict. That certain Jurors were fined, for taking Money after their Verdict, though there was no privatagement for it. 39 Assise. p. 19. Fined for taking Money after their Verdict.

The practice is otherwise at this day; if it were not, the Middlesex Juries would not so Court the Bayliffs to return them, especially to Tryals at Barr; where 5 l. a man is frequent Gratuity, sometimes more.

If a full Jury appear, and some are challenged off, so that the Jury remains for default of Jurors, the Defaulters shall loose their Issues. 4 H. 6. 7. otherwise if a Jury be sworn, and one is withdrawn by consent. Issues.

But if there be a joynder of Counties, and a Jury of one County appear, and not of the

the other. The Defaulters of that County from which enough came, shall not loose their Issues; because the Inquest doth not remain for their default, but for the default of them of the other County, 48 Ass. 5. Mes quære.

Amercement.

If the Jurors at the return of Scire fac. make default, yet they shall not be amerced, because the parties may be claimed at the first day, but at the return of the Habeas Corpora they shall. 10 E. 4. 19. 1 E. 3. 12.

Demand sur peine.

If any of the Jurors appear, the Court may charge them to inquire if any of the other Jurors were within the Town after the return; and if they find they were, they shall be demanded upon a Pein, and if they come not, they shall be amerced, Rolls tit. Trial. 632.

Juror fined for departing when he was challenged.

A Juror was challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Jury was demanded, but did not appear; for which default, he was fined the value of his Lands for a year; and the other Jurors inquired of the value, &c. although the other party then would have challenged him when he was demanded, so that he might have been treit. But the Court would not admit this, because then the King would have lost his Fine. 36 H. 6. 27.

If

If a Juror appear, and is adjourned upon pain, and makes default, in this Case, because he shall be fined to the value of his Land per annum, this shall be inquired by his Companions of the Jury, because the Court knows not the value of his Land. li. 8. 41. Juror adjourned upon pain.

A Verdict was taken from the Foreman of the Jury, to which one of them did not assent, and damages assessed to 20 s. in Trespass and Assault; and afterwards, every one of the 11. were fined, for giving their Verdict, before they were all agreed. 40 Assise 10. Fined for giving a Verdict before they were agreed.

Where a Jury are to be fined, a Fine jointly imposed on them, is not legal, but they must be severally fined, because the offence of one, is not the offence of another. Et nemo debet puniri pro alieni delicto; For then it might be said, Rutilius fecit, Æmilius plectitur. lib. 11. 42. The fine must not be joynt.

A man stroke a Juror at Westm. (sitting in the Court) who passed against him, and he was thereof indicted, and arraigned at the Kings Suit, and attainted, his judgment was, that he should go to the Tower, and stay there in prison, all days of his life, and that his right hand should be cut off, and his Lands seised into the Kings hands, 41 Assise. p. 25. and now our Juror sees what punishment Punishment for striking a Juror.

nishment it is to strike him, in the face of the Court. Let him hold his hands from others, least the same Judgment light on him.

By the Statute of 27 Eliz. cap. 6. It is Enacted, that upon every first Writ of Habeas Corpora, or Distringas, with a Nisi prius. 10 s. shall be returned in Issues, upon every person impannelled, and upon the second Writ 20 s. and upon the third 30 s. And upon every Writ that shall be further awarded to try any Issue, to double the Issues last, afore specified, until a full Jury be sworn.

Issues.

And these Issues being returned upon a Tenement in Fée simple, in tail or for life, of another, or himself, or in the right of his Wife; the Land he then hath will be chargeable for it, and any mans Cattel upon this Land may be distrained for it.

Not summoned.

But if the Under Sheriff, &c. return a Juror summoned, who in truth was not legally summoned, and therefore doth not appear, and so loseth Issues, the Under-Sheriff shall pay him double the value of the Issues lost. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

And note, the Law hath been so careful to punish all offenders, who would endeavour to

to byals, and corrupt the Jury; and to punish the Juries themselves, if they receive Money to give their Verdict, or any otherwise pre-ingage themselves to any of the parties; All which is to the end, that a true and honest Verdict may be given: What punishment shall that Jury have, which gives a false Verdict?

Such a punishment, that (as I said before) in civil Causes it is without example: and surely, if the Jurors did bear it in their minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Interests, or any partiality to either of the parties.

Wherefore if the Jurors give a false Verdict (which is perjury of the highest degree) upon an Issue joyned between the parties in any Court of Record, and Judgment thereupon. The party grieved, may bring his Writ of Atraint, in the Kings-Bench, or Common-Pleas; upon which, 24 of the best men in the County are to be the Jurors, who are to hear the same Evidence which was given to the Petite Jury, and as much as can be brought in affirmance of the Verdict, but no other against it. And if these 24. (who are called the Grand Jury) find it a false Verdict; then followeth this terrible and heavy Judgment, at Common Law, upon the Petite Jury. Attaint.

Judgment in Attaint.

1. That they shall lose liberam legem for ever, that is, they shall be so infamous, as they shall never be received to be a Witness, or of any Jury.

2. That they shall forfeit all their Goods and Chattels.

3. That their Lands and Tenements shall be taken into the Kings hands.

4. That their Wives and Children shall be thrown out of doors.

5. That their Houses shall be raised and thrown down.

6. That their Trees shall be rooted up.

7. That their Meadow-grounds shall be ploughed up.

8. That their Bodies shall be cast into the Goal, and the party shall be restored to all that he lost, by reason of the unjust Verdict. So odious is Perjury in this Case, in the eye of the Common-Law: And the severity of this punishment, is to this end, Ut pœna ad paucos, metus ad omnes perveniat; for there is Misericord a puniens, and there is Crudelitas parcens. And seeing all Tryals of real, personal, and mixt actions, depend upon the Oath of 12 men, prudent Antiqui-

ty

ty inflicted this ſevere puniſhment upon them, if they were attainted of Perjury. 1 Inſt. 294.

But now by the Stat. of 23 H. 8. cap. 3. The ſeverity of this puniſhment is moderated, if the Writ of Attaint be grounded upon that Statute.

But the party grieved, may at his Election, either bring his Writ of Attaint, at the Common-Law, or upon that Statute. Wherefore let the Juror expect the greateſt puniſhment, when he offends. 3 Inſt. 163. 222.

And ſo I conclude as to the Juror, only with the words of *Forteſcue*, Quis tunc (etſi immemor ſalutis animæ ſuæ fuerit) non formidine tantæ pœnæ, & verecundia tantæ infamiæ, veritatem non diceret ſic Juratus?

Who then, though he regard not his Souls health, yet for fear of ſo great puniſhment, and for ſhame of ſo great infamy, would not, upon his Oath, declare the truth?

But as to our Practicer, I would give this one further Advertiſement, which relates alſo to Jurors:

When a Verdict has been given by a former Jury in the ſame Cauſe, and on the

same Evidence it is allowed to give the former Verdict in Evidence, and I have known this Introduced by the Counsel, as obliging to the latter Jury to find accordingly; intimating, that otherwise they do (in effect) perjure the former 12 men, which may amuse tender minds, and draw them from the strict Inquiry into the Merits of the Cause, in favour of their Predecessors; which is a palpable mistake and misinformation, for these Reasons.

1. The same Evidence in the former Cause and Tryal (perhaps) was not so perspicuously delivered as in this.

2. This latter Jury may be of more sagacious and Comprehensive Judgment than the former.

3. The Directions of the Court (which the Jury most heed) may be more clearly delivered to this Jury.

4. The Matter in Contest (perhaps) was not in the former Tryal so clearly manag'd by the Counsel, being not so well instructed as afterwards.

5. And lastly, supposing, the Evidence equally delivered by the Witnesses, apprehended by the Jury, directed by the Court, manag'd by the Counsel, yet it's no perjury

or

or fault to differ in Judgment; for if 24 Jurymen were to try a Matter of Fact, and 12 were of one Opinion, and 12 of another, who is in fault? while they Judge according to the best of their Knowledge and Skill, to which (only) they are sworn. And it's a reasonable kindness to Jury-men, to make good Construction of differing Judgments among them, while we see, how oft Judges themselves differ in their Opinions, on a matter stated equally to them all, and that (not only as to matter of Law, but) as to matter of Fact, as attending Practicers may observe in Tryals at Barr, in the several Judges several Directions. And this I thought good to advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and express Evidence, and could instance some Cases. Sed verbum sat, &c.

As to the difference betwixt the Judge and the Jury, and that Question which has made such a noise, viz. Whether a Jury is fineable for going against their Evidence in Court, or the Direction of the Judge? I look upon that Question, as dead and buried, since Bushel's Case, in my Lord Vaughan's Reports; yet some of the Ashes thereof I may sprinkle here without offence. It doth appear there to have been resolved by all the Judges upon a full Conference at Serjeants-Inn, That a Jury is not fineable for going against

againſt their Evidence where an Attaint lyes; And that it is Evident by ſeveral Reſolutions of all the Judges, That where an Attaint lyes, the Judge cannot fine the Jury, for going againſt their Evidence, or Direction of the Court, without other Miſdemeanour.

And where an Attaint doth not lye, as in Criminal Cauſes upon Indictments, &c. My Lord Vaughan ſays theſe words, That the Court could not Fine a Jury at the Common Law, where Attaint did not lye; I think to be the cleareſt Poſition that ever I conſidered either for Authority or Reaſon of Law. And one reaſon for this, which can never be anſwered, is, The Judge cannot fully know upon what Evidence the Jury give their Verdict; for they may have other Evidence than what is ſhew'd in Court; They are of the Vicinage, the Judge is a Stranger, they may have Evidence from their own perſonal knowledge, that the Witneſſes ſpeak falſe, which the Judge knows not of; they may know the Witneſſes to be ſtigmatiſed and infamous, which may be unknown to the Parties or Court.

And if the Jury knew no more than what they heard in Court, and ſo the Judge knew ſo much as they, yet they might make different Concluſions, as oftentimes two Judges do; and therefore, as it would be a ſtrange and abſurd thing to puniſh one Judge for differing with

with another in Opinion or Judgment; so it would be worse for the Jury, who are Judges of the Fact, to be punished for finding against the Direction of him who is not Judge of the Fact. But he that would be better satisfyed in this point, may read that Case, and the Authorities, and Reasons given by my Lord Vaughan, whom I must honour, as a man of great reason.

It is shewed in that Case, That much of the Office of Jurors, in order to their Verdict, is Ministerial, as not withdrawing from their fellows after they are sworn; not receiving from either side Evidence after their Oath, not given in Court, not eating and drinking before their Verdict, refusing to give a Verdict, and the like; wherein if they transgress, they are Fineable: But the Verdict it self when given is not an act Ministerial, but Judicial, and according to the best of their judgment; for which they are not fineable, nor to be punisht but by Attaint.

Nor can any man shew, That a Jury was ever punisht upon an Information, either in Law, or in the Star-Chamber, where the Charge was only, for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation or the like, were joyned.

But

But the Fining and Imprisoning of Jurors for giving their Verdicts, hath several times been declared in Parliament an Illegal and Arbitrary Innovation, and of dangerous Consequence to the Government; the Lives, and Liberties of the People. This celebrated tryal by Juries, having been confirmed by many Parliaments.

Littleton, Sect. 368. tells us, That as the Jury may find the matter at large, that is a Special Verdict, (which the Court cannot refuse, if it be pertinent to the matter put in Issue) and leave the Law to the Court so if the Jury will, they may take upon them the knowledge of the Law upon the matter, and may give their Verdict generally, as is put in their Charge. As for example, upon all general Issues; As Not guilty pleaded in Trespass, Nil debet in Debt, Nul Tort, nul disseisin, in Assise. Ne disturba pas in Quare impedit, &c. Though it be matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor, or Disturber, in the particular Cases in Issue; yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for the Plaintiff, or Defendant, upon the Issue to be tryed, wherein they resolve both the Law, and the Fact complicatly; and not the Fact by it self. And so upon Not guilty to an Indictment of Felony, Breach of the Peace, Trespass. &c.

and

and other Cales where the Law and the Fact are complicate and joyned, they may determin upon both: Yet I must give them my Lord Coke's Caution, which is, That although the Jury, if they will, may take upon them the knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do; for if they do mistake the Law, they run into the danger of an Attaint. Therefore to find the matter specially, is the safest way where the Case is doubtful.

And to end, as I begun, That Decantatum in our Books (as my Lord Vaughan calls it) Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores, Literally taken is true; for if it be demanded what is the Fact? the Judge cannot answer it: If it be ask'd, what is the Law in the Case? the Jury cannot answer it. But upon the general Issue, if the Jury be asked the Question, guilty, or not? which includes the Law, they resolve both Law, and Fact, in answering Guilty, or Not Guilty. So as though they answer not singly to the Question what is the Law; yet they determine the Law in all matters, where Issue is joyned and tryed, but where the Verdict is Special. But in such Cales, the Judge cannot of himself answer, or determine one Particle of the Fact, but must leave it to the Jury, with whom let it rest and continue for ever, as the best kind of

tryal in the world for finding out the Truth; and the greatest safety of the just Prerogatives of the Crown, and the just Liberties of the Subject; and he which desireth more for either of them, is an Enemy to both.

FINIS.